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80-1798

No. ....

IN THE

Supreme Court of the United States

October Term, 1980.

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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QUESTIONS PRESENTED.*

1. Does the existence of a collective-bargaining relationship between a construction union and a construction employer invariably legalize a secondary-boycott agreement inherent in a union-signatory subcontractor clause under the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e)?
2. Did the Court of Appeals misinterpret this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975), by holding that the construction industry proviso to Section 8(e) of the Act privileges broad union-signatory subcontracting provisions which are not designed to eliminate jobsite friction between union and non-union workers at a particular construction jobsite?
3. Does Section 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(A), prohibit a union from engaging in "top-down" organizing by striking or picketing to force a contractor to execute an agreement containing a union-signatory subcontractor clause otherwise protected by the construction industry proviso to Section 8(e) of the Act?

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*The questions presented in this case are similar and related to those in *Donald Schriver, Inc., et al. v. N.L.R.B.*, numbered in this Court as Case No. 80-1257, in which a petition for writ of certiorari has been filed.

LIST OF PARTIES TO PROCEEDING BELOW.

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

The caption of the within matter contains a listing of the names of all parties in the proceeding below in this matter which was numbered Case No. 78-3468 in the U. S. Court of Appeals for the Ninth Circuit.

However, the within matter was consolidated with other cases for purposes of oral argument and decision below. See Case Nos. 78-3469, 78-3487, 78-3619, and 79-7011. The parties to those other cases in the proceeding below were:

1. Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.;

2. Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.;

3. International Union of Operating Engineers, Local No. 701; and

4. National Labor Relations Board.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Woelke & Romero Framing, Inc., respectfully prays that a Writ of Certiorari issue to review the *en banc* judgment of the U.S. Court of Appeals for the Ninth Circuit which was entered in this proceeding on April 17, 1981.[1]

[1]The within matter was numbered Case No. 78-3468 in the Court of Appeals, and was consolidated for argument and decision with certain other related cases. The National Labor Relations Board was the Respondent below, and the Unions were Intervenors below.

Statutory Provisions Involved.

United States Code, Title 29:

§158(b)(4)(i) and (ii)(A)

"It shall be an unfair labor practice for a labor organization or its agents — (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);"

§158(e)

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

Opinions and Orders Below.

The judgment and opinion of the limited *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit, which was entered in this matter on April 17, 1981, is styled, *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., etc., et al. v. National Labor Relations Board, et al.*, and is not yet officially reported. It appears as Appendix A.

The prior judgment and opinion of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit which was issued on December 26, 1979, is officially reported at 609 F.2d 1341 (9th Cir. 1979), and appears as Appendix B.

The Decision and Order of the National Labor Relations Board ("Board"), which was reviewed by the U.S. Court of Appeals for the Ninth Circuit pursuant to a Petition for Review filed under 29 U.S.C. §160(f), is officially reported at 239 N.L.R.B. 241 (1978), and appears as Appendix C.

Jurisdiction of the Supreme Court.

The judgment and opinion of the limited *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit was entered on April 17, 1981. No petition for rehearing, or for further hearing before the full Court, has been filed.

The U.S. Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). See, 29 U.S.C. §§160(f) and 160(e).

Statement of the Case.

Statement of Facts.

Woelke & Romero Framing, Inc. ("Woelke & Romero"), is a framing subcontractor in the building and construction industry in Southern California and, insofar as relevant to the time period herein involved, had construction subcontracts with various general contractors and builders

calling for Woelke & Romero to perform construction framing work.

Woelke & Romero had had a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its various district councils and local unions, including Carpenters Local 944 and Carpenters Local 235 ("Unions") involved in this case, since at least 1974. The most recent collective-bargaining agreement was due to expire June 15, 1977.

Between June 3 and August 4, 1977, the Unions and Woelke & Romero engaged in collective-bargaining for a successor agreement. On August 4, 1977, the Unions and Woelke & Romero reached an impasse in bargaining over various proposals, including the Unions' proposal dealing with the subcontracting of work which contained the following "subcontractor clauses":

> "103.2 The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement."
>
> "103.5 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.
>
> "103.6 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of

material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement." (Pet. App. C, pp. 78-80)[2]

Since August 4, 1977, no further collective-bargaining sessions have been held. In support of the Unions' demand for the above contract provisions, the Unions picketed at the construction jobsites at which Woelke & Romero was working. As a result of the picketing, individuals employed by various other subcontractors engaged in work stoppages and refusals to perform services for their respective employers.[3]

Proceedings Below.

On August 11, 1977, Woelke & Romero filed an unfair labor practice charge alleging that the Unions had violated Section 8(b)(4)(i) and (ii)(A) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b)(4)(i) and (ii)(A), by picketing at various jobsites to force Woelke & Romero to enter into a collective-bargaining agreement containing the union-signatory subcontracting restrictions which it believed were violative of Section 8(e), 29 U.S.C. 158(e), of the Act. On September 23, 1977, the Board's General Counsel issued a Complaint on the charge, and the matter was later presented to the Board on a Stipulation of Facts. Oral argument in this and certain other related proceedings was held before the Board in Washington, D.C., on February 23, 1978. On November 13, 1978, the Board issued its Decision and Order finding and concluded that the sought clauses were not un-

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[2]The Appendix herein will be cited to as "Pet. App." followed by a reference to the appropriate appendix and page number.

[3]The Unions sought additional clauses which are set forth in Appendix (Pet. App. C, pp. 78-80)

lawful under the Act, and that the Unions had not violated the Act by picketing to obtain them.[4]

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 10(f) of the Act, 29 U.S.C. §160(f), on November 14, 1978, Petitioner filed a Petition for Review of the Board's Decision and Order with the U.S. Court of Appeals for the Ninth Circuit.

On December 26, 1979, a three-judge panel of the Court of Appeals entered its consolidated judgment and opinion in this and the other related cases, *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc., et al. v. N.L.R.B., et al.*, 609 F.2d 1341 (9th Cir. 1979). The three-judge panel reversed the Board in material part and sustained Woelke & Romero's Petition for Review. On January 30, 1980, the Board and the Unions filed petitions for rehearing, and rehearing *en banc*.

On August 19, 1980, the Court of Appeals issued an Order granting the petition for rehearing *en banc* and ordered

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[4]When this matter was pending before the Board in 1978, it was consolidated with several related proceedings. Because of their importance in the application of the Act, the Board took the unusual step of hearing 7 hours of oral argument with respect to this and the related proceedings, and decided all of them together. *See, Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.)*, 239 N.L.R.B. 253 (1978); *Los Angeles Building and Construction Trades Council;* and *Local Union No. 1497, United Brotherhood of Carpenters & Joiners of America (Donald Schriver, Inc. and Sullivan-Kelly & Associates)*, 239 N.L.R.B. 264 (1978); and *International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)*, 239 N.L.R.B. 274 (1978). The *Schriver* case was thereafter appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and the *Woelke & Romero* and *Pacific Northwest* cases were appealed to the U.S. Court of Appeals for the Ninth Circuit.

The Board's view of this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975) was stated in its *Woelke & Romero* decision.

This case presents questions and issues closely related to those in *Donald Schriver, Inc. et al. v. N.L.R.B.* now pending on a petition for writ of certiorari before this Court in Case No. 80-1257.

the matter reheard before a limited *en banc* panel of the Court of Appeals as provided by Public Law 95-486, 92 Stat. 1629, 1633 and Rule 25 of the local rules of the U.S. Court of Appeals for the Ninth Circuit.

On October 16, 1980, oral argument before a limited *en banc* Court was held in San Francisco, California. On April 17, 1981, the *en banc* Court issued its judgment and opinion.

The Decisions of the Board and Court of Appeals Below.

The Board concluded that the subject contract clauses were union-signatory subcontractors clauses which obligate the employer not to do business with another unless the latter is signatory to the union's agreement.[5] The Board construed them to be secondary in thrust and within the scope of Section 8(e) of the Act because the clauses are addressed to the labor relations policies of *other* employers vis-a-vis their employees. The Board further found that the clauses were privileged by the construction industry proviso to Section 8(e) of the Act since they were sought within the context of the Unions' collective-bargaining relationship with Woelke & Romero. The Board also found that the Unions, therefore, did not violate Section 8(b)(4)(A) of the Act by striking and picketing Woelke & Romero to force its agreement to the clauses.

The Board's decision that the subcontracting provisions were privileged by the proviso construed this Court's decision in *Connell Construction Co., Inc. v. Plumbers &*

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[5]The expression "union-signatory subcontractors clauses" refers to the type of restrictive subcontracting agreement which obligates the chosen subcontractor to have the very same agreement with a particular union and to be bound by all of its provisions. The "secondary" thrust of such agreements comes from the requirement that *all* provisions be acknowledged by the subcontractor, including those dealing with union-recognition, hiring from the union's hiring hall, and provisions forcing the subcontractor's employees to observe the requirement to *join* a particular union as a condition of continued employment under the union-security provisions of the contract.

Steamfitters, Local Union 100, 421 U.S. 616 (1975), as follows:

> ". . . the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem . . ." 239 N.L.R.B. at 250 (Pet. App. C, pp. 97-98)

The Board considered, but rejected, the contention that this Court's decision in *Connell* required that the shelter of the construction industry proviso to Section 8(e) be limited to only those secondary jobsite subcontracting agreements which are *both* (1) contained in the context of a collective-bargaining relationship, *and* (2) operational at times and sites at which the employer has employees represented by the union, and do not require bargaining relationships with a particular union. 239 N.L.R.B. at 248. In effect, the Board held that the mere existence of the collective-bargaining relationship between the Unions and Woelke & Romero, invariably and without more, was sufficient to give the clauses legal shelter under the proviso.

The Court of Appeals initially disagreed with the Board. Speaking for a unanimous three-judge panel of the Court of Appeals, Judge Sneed held the clauses outside the proviso because they were broader than the proviso's purpose and operational even at sites when and where no union workers were employed:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a non-union subcontractor." *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v.*

N.L.R.B., et al., 609 F.2d 1341, 1347 (9th Cir. 1979). (Pet. App. B, p. 62)

However, that decision was later vacated, and a limited *en banc* panel of the Court of Appeals split 7-4, and sided with the Board and the Unions. (Pet. App. A, p. 1) The majority of the *en banc* Court, in an opinion written by Judge Canby, concluded that the proviso shelters union-signatory subcontractor clauses without regard to the presence or absence of union workers at the jobsite, so long as such clauses are contained in or sought as part of a collective-bargaining relationship. Further, the *en banc* majority concluded that unions may strike employers to force the execution of such clauses:

> "We find that provisions in a collective-bargaining agreement forbidding the signatory employer to subcontract work at a construction site to firms that do not have a contract with the signatory union are within §8(e) of the National Labor Relations Act, but are protected by the construction industry proviso to that section. They need not be limited to jobsites presenting the possibility of conflict between union and non-union workers. We also find that unions may picket or strike to induce employers to enter such agreements . . ." (Pet. App. A, p. 43)

The *en banc* minority in a dissenting opinion written by Judge Sneed and joined by Judges Choy, Anderson and Farris, concluded that the original three-judge panel opinion of the Court was correct, and that the import of this Court's decision in *Connell* required the view that the proviso sanctioned only those clauses which were both in the context of a bargaining relationship and which were operational only at sites when union workers worked alongside non-union workers. (Pet. App. A, p. 44)

REASONS FOR GRANTING THE WRIT.

INTRODUCTION.

This case raises ". . . *important* questions concerning the scope of 8(e) of the National Labor Relations Act . . ." (Pet. App. A, p. 1). (emphasis added)

In that manner, the *en banc* Court below began its majority opinion legalizing broad "cease doing business" agreements. Its holding that a construction union may enter into broad union-signatory subcontractors clauses, and may picket to secure them, so long as the clauses are part of or sought in a collective-bargaining relationship, effectively permits a construction union to engage in unlimited "top-down" organizing contrary to decisions of this Court and to Congress' legislative judgment. Moreover, the *en banc* majority's reasoning fails to give credence to this Court's prior holding that the proviso's shelter must be limited to clauses whose purpose is to alleviate jobsite frictions on particular common-situs construction sites.

This Court previously has recognized that broad union-signatory subcontractors clauses, such as those validated by the decision below, can have far-reaching adverse consequences. In *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975), this Court, considering a clause almost identical to those here, noted in an anti-trust context that such provisions outside a bargaining relationship were not related to any policies protected by the labor laws, and that such provisions could have the potential to restrain competition in ways that ". . . would not follow naturally from the elimination of competition over wages and working conditions." *Id.*, at 625.

The broad union-signatory subcontractor clauses involved here are "agreements to conduct a secondary boycott". As such, their validation can only serve to cause substantial and significant policy conflicts under the federal labor laws

such as (1) the statutory right of workers to freely choose their bargaining representative without the coercive "top-down" organizing inherent in secondary-boycott union-signatory subcontractor clauses vs. the desire of construction unions to utilize subcontractor clauses as "top-down" organizing tools because of the nature of the construction industry, and (2) a construction union's interest in standardizing wages and working conditions vs. the right of construction users, owners, developers, and general contractors to determine the identity of the firms with whom they will do business without broad union restraints on that choice.

The delicate balance between these policy questions was struck incorrectly by the Court below in favor of a construction union's unrestrained use of union-signatory subcontractor clauses and against the statutory and common-law rights of workers and employers.

The decision below, thus, adversely affects the construction industry and federal labor policy. Thousands of construction workers who have chosen to remain non-union, or who have chosen to be represented by other than the "correct" union are penalized for such a choice: their work opportunities are lessened by their employers' ineligibility to compete for work in a certain segment of the construction market. Moreover, the construction users' and general contractors' acknowledged freedom to determine the most efficient, and perhaps the least costly, manner of performing work has been restrained.

Hence, the important matters of federal policy presented by the issues in this matter and by the decision below reveal the necessity for their review and resolution by this Court.

ARGUMENT.

The Decision Below Conflicts With This Court's Decision in Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, 421 U.S. 616 (1975).

The pivotal question before the Court of Appeals was: how broad an exemption from Section 8(e) of the Act did Congress intend to give construction unions when it added

the construction industry proviso to that Section? That was the same question presented to this Court in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra*. The Court of Appeals and this Court are in conflict on the answer to this question, and this conflict requires prompt resolution by this Court.

In *Connell*, this Court concluded that the proviso's exemption had to be determined in light of the statutory setting surrounding its enactment. After reviewing that setting, it narrowed the proviso's literal meaning, asserting that its exemption is narrower than its words. Fairly interpreted, *Connell* holds that the shelter, if any, given secondary subcontract provisions by the proviso is no greater than the reason for the proviso's enactment. *Id.*, at 628.

In *Connell*, the union demanded that Connell execute an agreement which would have required that Connell subcontract its plumbing mechanical work only to firms which had agreements with Local 100. When Connell refused to execute the agreement, Local 100 picketed Connell's jobsite to compel its execution. Connell did not normally perform plumbing mechanical work with its own employees, and Local 100 was not and did not want to be the collective-bargaining representative of any of Connell's employees. The Court, when presented with the question as to whether or not this particular subcontracting agreement fell within the protection of the construction industry proviso to Section 8(e) of the Act, held that although the agreement appeared privileged by the proviso's words, the agreement was not so privileged because, in the Court's opinion:

> "... we think [the proviso's] authorization extends only to agreements in the context of collective-bargaining relationships, and in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633.

This Court interpreted the construct construction industry proviso as "a measure designed to allow [certain secondary] agreements" pertaining to work on a construction site, *because of* the close community of interests shared by workers there, including the interest of avoiding the frictions that may arise when union men work continuously alongside non-union men at a construction site. *Id.*, at 630.[6]

The decision below, however, concluded that the prevailing thrust of *Connell* favors a "*broader* view of the [construction industry proviso's] exemption" (Pet. App. A, p. 23) that would essentially permit all union-signatory subcontractor clauses, even those which are not directly related to union worker vs. non-union worker "interests" on a

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[6]*Accord, International Union of Operating Engineers, Local 542 (York County Bridge)*, 216 N.L.R.B. 408, 409 (1979), *enforced*, 532 F.2d 902 (3rd Cir. 1976) ("The 8(e) proviso was intended to prevent labor strife among non-union and union employees at the same jobsite"); *Drivers, Salesmen, etc., Local 695 v. N.L.R.B.*, 361 F.2d 547, 553 (D.C. Cir. 1966) ("The purpose of the Section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site"); *Essex County and Vicinity District Council of Carpenters v. N.L.R.B.*, 332 F.2d 636, 640 (3rd Cir. 1964) ("This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft union men to work alongside non-union men on the same project"); *Associated General Contractors of California, Inc. v. N.L.R.B.*, 514 F.2d 433, 439 (9th Cir. 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and non-union employees on the same jobsite").

Obviously, the "close community of interests" referred to by the Court includes the narrower "shoulder-to-shoulder" purpose. However, the "close community of interests" purpose is no broader than the purpose behind the 1959 Congressional proposals to overrule *Denver Building Trades, see* 421 U.S. at 629, and is no broader than the protection of the common interests shared by all workers at the common situs— ". . . they work *side by side and the wages and working conditions of one trade affect all the others.*" II, *Leg. Hist. of Labor-Management Reporting and Disclosure Act of 1959*, at 1577.

Accordingly, it would appear that the proviso's sanction is clearly no broader than the protection of the union's interest in preventing *jobsite tension* between the union and non-union workers over their union versus non-union status or their working conditions.

particular construction site. In this regard, the *en banc* Court of Appeals suggests that the maintenance of industry-wide contract standards or preserving the general continuity in benefits of the unions' members are interests protected by the proviso. (Pet. App. A, pp. 26-27, and p. 51, Judge Farris, dissenting.)

This Court's view of the exemption provided by the proviso and that of the Court of Appeals are, hence, in direct conflict.

This Court's view of the proviso would shelter only those otherwise secondary agreements which are related to the proviso's jobsite interests. The latter would shelter those which are related to general construction union interests such as maintaining industry-wide contract standards.[7]

Under this Court's rationale, subcontractor clauses which restrict a contractor from subcontracting to non-union subcontractors are sheltered by the Section 8(e) proviso only if there are in the context of a collective-bargaining relationship and then only if they are limited in language, purpose, and use to the union's interest on particular jobsites in alleviating the frictions that may arise between union and non-union workers at the site, or to some other specific interest at a particular site.[8]

Under the Court of Appeals' rationale, such clauses are sheltered invariably by being in a collective-bargaining re-

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[7]The *en banc* Court's apparent view that Congress intended for the proviso to protect contract standards in the construction industry does not find any definitive support in the legislative history to Section 8(e) or its proviso. Moreover, "contract standards" would appear to be capable of protection by a primary "union standards" clause which would be outside the general thrust of Section 8(e) and, thus, not covered by the proviso in any event. See, dissenting opinion of Judge Farris at Pet. App. A, p. 51)

[8]As Petitioner understands *Connell*, the words "collective-bargaining relationship" refer to one where the contractor employs workers represented by the signatory union at the particular jobsite. It is only then that the contractor is not a "stranger" to the union.

lationship without regard to the purposes served by such clauses or the magnitude of the restraint on doing business involved.

The Court below buttressed its conclusion by remarking that Congress was aware of and approved a "pattern of collective-bargaining," which included broad union-signatory subcontractor clauses, and that Congress thus *intended* for the proviso to legalize these specific kinds of clauses. (Pet. App. A, p. 24).

However, this Court has dismissed the legislative history reference to a "pattern of collective bargaining" as support for the reason for enactment of the proviso. 421 U.S. at 628-29. This Court felt that the proviso was a "partial substitute" for legislatively overruling this Court's decision in *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951), and confined the proviso's purpose and exemption to that problem.

The Court of Appeals' decision does not so limit the proviso, but expands it to permit a construction union to utilize union-only subcontracting provisions simply because they are contained in a union contract and recite that they will apply to some construction site, somewhere. This is contrary to this Court's belief that such clauses are legitimated by the proviso only where they are limited to particular construction sites involving common-situs interests.[9]

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[9]Professor Gorman, has concluded:

> "*Because of the frictions* traditionally created by the presence in the construction industry of union and nonunion employees working side-by-side at the jobsite, *section 8(e) expressly exempts* from its ban hot cargo provisions 'relating to the contracting or subcontracting of work to be done at the site of the construction.'
>
> "....
>
> "The [*Connell*] Court read the legislative history of the construction industry proviso to evidence a *Congressional concern for the union which used the hot cargo agreement in order to eliminate the friction of having union and nonunion employees working alongside each other on a construction site*. This policy

(footnote continued on following page)

The Court of Appeals' approval of broad union-signatory subcontractor clauses restrains the contractor's subcontractor's employees in the selection of their collective-bargaining representative, forcing them to choose the signatory union as their representative and economically penalizing those employees for their free choice not to be represented by the signatory union, a different union or no union, by making their employer ineligible to compete for certain work. Permitting this type of economic coercion in aid of a construction union's organizing would open that glaring loophole in the Act's restrictions on "top-down" organizing not intended by Congress or by this Court, *Id.* at 633. As this Court has stated before: "The Act is wholly neutral when it comes to that basic choice [for or against a particular union.]" *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). The Court of Appeals' decision taints the neutrality of the Act, contrary to this Court's and Congress' intent.

This Court concluded in *Connell* that Congress intended that garment industry unions could use subcontractor agreements as organizational weapons, but that construction unions were *not to be permitted* to use broad top-down economic pressure in aid of organizational goals. *Id.*, at 630 (". . . Congress did not . . . indicate that [construction unions] were free to use subcontracting agreements as a

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was inapplicable to the union in *Connell because that union was not seeking to protect the employees of the general contractor* (whom they were not organizing) from working alongside nonunion employees, was not seeking thus to protect its own members (since the ban on subcontracting would apply even on jobsites at which these members were not yet employed, and even if they were employed the ban would not forbid the use of other nonunion subcontractors), and was not seeking to organize any particular nonunion subcontractor on the jobsite at which the picketing took place (since the objective was generally to exert pressure on mechanical subcontractors in the Dallas area). The Court doubted that Congress intended to shelter hot cargo agreements with contractors who were 'strangers' to the union, thereby giving construction unions 'an almost unlimited organizational weapon' in achieving 'top-down' organizing against the wishes of employees." R. Gorman, *Basic Test on Labor Law* 271-73 (West, 1976) (emphasis added).

broad organizational weapon.") The Court of Appeals' decision permits the very vice this Court did not believe should be the province of construction unions.

In sum, the decision below is contrary to the language, policy, and intent of this Court's *Connell* decision. Consequently, the Court of Appeals' conclusion that the ". . . existence of a collective-bargaining relationship *clearly* brings a union-signatory subcontracting agreement within the proviso to 8(e) . . ." was wrong. This error requires prompt review and reversal by this Court.

The Decision Below Presents Important Questions, Previously Unanswered by This Court, Concerning the Extent of the Validity Under Section 8(e) of the Act of Agreements to Conduct Secondary Boycotts in the Construction Industry.

In *Local 1976, United Brotherhood of Carpenters etc., et al. v. N.L.R.B.* (*Sand Door and Plywood Company*), 357 U.S. 93 (1958), this Court exhaustively examined the legislative history, meaning, and reach of Section 8(b)(4) of the Act as applied to a construction union's attempted use of a "hot cargo" clause — an agreement to conduct a secondary boycott — in a collective bargaining agreement as a defense to that Section of the Act. This Court held that such a provision, even if voluntarily agreed to, could not be such a defense.

But this Court, in *Sand Door*, did not reach the validity or legality of such a provision contained in a collective-bargaining agreement. Indeed, the Court stated: "There is no occasion to consider the validity of hot cargo provisions as such." 357 U.S. at 107.

When Congress attempted to strike down "hot cargo" clauses in the main portion of Section 8(e) and to exempt from that prohibition certain agreements relating to the contracting of work to be done at construction sites, it *assumed* the legality of the latter agreements. Thus, the legislative

history to Section 8(e) and the proviso contains statements that such jobsite construction agreements ". . . *appear to be* legal today. . . ." II, *Legislative History of the LMRDA of 1959*, p. 1433.

This Court had not then so ruled, and it has not yet definitively done so. This Court's decisions in *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612 (1967), and *Houston Insulation Contractors Ass'n v. N.L.R.B.*, 386 U.S. 664 (1967), dealt with the primary-secondary scope of Section 8(e) of the Act, but not with the application of that Section's construction industry proviso.

This Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra*, did construe the application of the construction industry proviso to a "hot cargo" clause — specifically, a union-signatory subcontractor clause — but did so in an anti-trust context and in a situation not involving a collective-bargaining agreement.

Hence, this case presents an appropriate vehicle for this Court now to delineate what it left open in *Sand Door* and did not definitively determine in *Connell*: the extent of the validity or invalidity of "hot cargo" provisions, including union-signatory subcontractor clauses, in construction industry collective-bargaining agreements, and the types of such agreements Congress meant to protect under the proviso to Section 8(e).

Such a determination, of necessity, will require an examination of the purpose of the enactment of Section 8(e) and its construction industry proviso, an examination initially articulated by this Court in *National Woodwork Manfacturers Ass'n v. N.L.R.B., supra*, continued, exhaustively, in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra*, and in need of further clarification by this Court to clear up ambiguities remaining after *Connell*. Thus, on the question of the pur-

pose and breadth of the proviso, the decision below was adverse to Petitioner. But, as the majority of the *en banc* Court noted:

> "[T]he *Connell* decision, . . . admittedly has language that might point to *either* result . . ." (emphasis supplied) (Pet. App. A, p. 39)

Indeed, the *en banc* Court below split 7-4 on the question of the congressional intent behind the proviso, on the question of the validity of the subcontractor clauses at issue, and on the interpretation of the *Connell* opinion's language concerning the shelter afforded such agreements by the proviso. The four dissenting judges concluded that the subcontractor agreements in issue could not be privileged by the proviso because in their view, and, the now-vacated view of the three-judge panel of the Court, 609 F.2d 1341 (9th Cir. 1979), subcontractor clauses are privileged only in the context of a collective-bargaining relationship *and* then only if applicable to particular jobsites where union workers are working with non-union men.

In contrast, the seven judges in the majority, admitting the ambiguity of the words, stated:

> "Finally, in summarizing the proviso's effect, the *Connell* Court stated:
>
> > '[W]e think its authorization extends only to agreements in the context of collective bargaining relationships and in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.'
>
> 421 U.S. at 633. *While it might be susceptible to another reading*, (emphasis supplied) we interpret this language to mean that the existence of a collective bargaining relationship *clearly* brings a union signatory subcontracting agreement within the proviso to §8(e) and that in the absence of a collective bargaining relationship, it is possible that such an agreement may

> be valid where the union actually has workers on the job that may be threatened with shoulder-to-shoulder friction.[37]'' (Pet. App. A, 37)

The seven-judge majority added that the Courts and commentators have varied in their understanding of whether or not the above-quoted *Connell* language requires both a collective-bargaining relationship and a limitation to particular jobsites. (Pet. App. A, p. 37, n.37).

Clarification of the extent of the proviso's shelter is now needed in view of the lack of clarity in *Connell* on this point. For example, a distinguished commentator has stated:

> ''Logically, under the [*Connell*] majority's rationale, either the existence of a collective bargaining relationship or the limitation of the agreement to particular jobsites (where union men are working?) would appear to be a separate, independent basis for Section 8(e) proviso coverage and concomitant antitrust immunity. *The Connell opinion is not clear on these points.*'' (emphasis added.)

St. Antoine, ''*Connell: Antitrust Law At The Expense of Labor Law,*'' 62 Va. L. Rev. 603, 619 n.74 (1976).

The instant case presents the opportunity for this Court to give the industry and the Courts definitive guidance on when these ''secondary boycott'' agreements, even though contained in a collective-bargaining relationship, are legitimated by the proviso to Section 8(e). The Court should take this opportunity to do so in view of the substantial importance the case has in the application of the Act to construction industry unions, workers, and employers, and in view of the substantial conflict within the Court of Appeals below on this issue.

The Extent of a Construction Union's Right to Engage in Top-Down Organizing by Picketing Employers to Obtain Union-Signatory Subcontracting Agreements Has Not Been and Should Be Determined by This Court.

The Court of Appeals' decision sustains the Board's view that a construction union can utilize strikes and picketing to obtain a union-only subcontracting agreement if that agreement is otherwise protected by the construction industry proviso to Section 8(e) of the Act. (Pet. App. A, pp. 40-41). This conclusion of both the Board and the Court of Appeals is contrary to the legislative history behind the enactment of the proviso and Section 8(b)(4)(A) of the Act.

This Court has never determined the extent to which a construction union can utilize coercive conduct to extract union-signatory subcontracting agreements from unwilling employers. It should take the opportunity to do so in this case.

In this regard, in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra,* this Court acknowledged the contention that the proviso to Section 8(e) of the Act was intended to permit only *voluntary* jobsite subcontracting agreements. In view of its holding that the agreement there was outside the proviso, this Court did not reach the issue. 421 U.S. at 634, n.14. As this Court noted in *Connell,* the foundation for this contention was that Congress intended Section 8(b)(4) of the Act to forbid such picketing. *Id.*

Subsequent to the 1959 congressional amendments which added Section 8(e), its proviso, and Section 8(b)(4)(A) to the Act, the Board construed the legislative history to these Sections to mean that Section 8(b)(4) outlawed *all* picketing or economic coercion designed to force an employer to enter into union-signatory subcontracting agreements otherwise protected by the proviso. *Construction, Production, and*

Maintenance Laborers Union, Local 383 (Colson and Stevens Construction Co., Inc.), 137 N.L.R.B. 1650 (1962), *enf. denied*, 323 F.2d 422 (9th Cir. 1963). The Board's position in *Colson and Stevens* was fairly straight-forward. It found support in the Conference Report to the House dealing with the enactment of the proviso to Section 8(e) for the proposition that Congress intended for the proviso to permit only voluntarily-entered subcontracting agreements. Thus, in the Board's view, if such were entered into involuntarily, they were prohibited by Section 8(e) and the coercion used to exact them would be within the literal proscription of Section 8(b)(4)(A) of the Act. *Id.*, 137 N.L.R.B. at 1651-52.

The circuit courts which considered the issue shortly thereafter disagreed with this view. *Essex County and Vicinity District Council of Carpenters and Millwrights v. N.L.R.B.*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48 v. N.L.R.B.*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Construction, Production & Maintenance Laborers Union, Local 383*, 323 F.2d 422 (9th Cir. 1963). The Board subsequently agreed with those courts that since Section 8(b)(4)(A) referred to only "agreements prohibited by Section 8(e)," the construction proviso was incorporated by that reference and that it, thus, literally permitted picketing and strikes to force a construction employer to agree to a proviso-protected subcontracting clause. *Northeastern Indiana Building and Construction Trades Council (Centrilivre Village Apartments)*, 148 N.L.R.B. 854 (1964).

Adherence to this rule by the Court, below, which is at variance with the legislative history, permits a construction union to do that which Mr. Justice Powell, writing for a majority of the Court in *Connell*, stated was contrary to congressional intent: permitting construction unions to use broad subcontracting agreements as "top-down" organizing tools. Here, the Unions are and have been at liberty to strike and picket Woelke & Romero because the latter would not

agree to take part in the Unions' top-down organizing inherent in agreeing to the subcontractor clause. Woelke & Romero is now and has been powerless to resist the Unions' coercive pressure except by executing the agreement. Section 8(b)(7) of the Act, 29 U.S.C. §158(b)(7) affords no remedy, contrary to the implication of the *en banc* majority below (Pet. App. A, p. 36) inasmuch as that Section applies only to picketing for the purposes of acquiring initial union recognition and not to picketing in furtherance of contract demands during an existing bargaining relationship. *N.L.R.B. v. Iron Workers, Local 103 (Higdon Contracting)*, 434 U.S. 335 (1978). The Court of Appeals below has stated that Section 8(b)(4)(A) of the Act does not prohibit the Unions' conduct. The Unions' coercive force for a top-down organizing agreement is, therefore, unlimited and unrestrained here: even though Woelke & Romero had a bargaining relationship with the Unions and did say "No" to them when it was asked to sign a contract containing those provisions, it subjected itself to unrestrained picketing pressure to force it to so agree as a penalty for that bargaining position. This Court has doubted that Congress intended for construction unions to have such unrestrained power. *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra,* at 631-32.

Further, this Court has heretofore indicated ". . . that §8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment. . . ." *Id.*, 421 U.S. at 628. And, the circumstances surrounding its enactment show that Congress did not intend that restrictive secondary subcontracting agreements could be obtained by picketing. Thus, in explaining the Conference Report to the House dealing with the enactment of the proviso, Representative Barden, one of the conferees, stated:

> "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construc-

tion industry relating to the contracting or subcontracting of work to be done directly on the site of construction.

"This proviso is intended to permit what is now lawful and deals only with situations where there is a contractor or subcontractor relationship and not to situations where there is no privity of contract between two or more contractors on a particular site. Such as in the case of cocontractors, each having direct contracts with the owner." (Emphasis added.) II, *Legislative History of the LMRDA of 1959*, p. 1715.

Since one of the major aims of the 1959 Act was to restrain and limit "top-down" organizing, to permit a construction union to avoid these restrictions by picketing to obtain a secondary union-signatory subcontractor clause would open a loophole in the Congressional scheme. *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra* at 632-33.

Finally, inasmuch as part of the Congressional scheme may have been to preserve the law existing prior to 1959 as to a union's right, or lack thereof, to picket to obtain such agreements, it would be more in line with the Congressional intent to prohibit picketing to secure such agreements. The Board had held prior to 1959 that picketing to achieve a subcontractors clause was illegal under Section 8(b)(4). *See, e.g., Local 47, Teamsters (T. C. Bateson Construction Co., and Texas Industries)*, 112 N.L.R.B. 923 (1955), enf'd, 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council, AFL-CIO (Davison Construction Company, Inc.)*, 123 N.L.R.B. 484 (1959), enf'd, 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons etc. (Selby-Battersby & Company)*, 125 N.L.R.B. 1179 (1959). Consequently, it is also likely that Congress did not intend for Section 8(b)(4)(A) to be construed to overrule that body of law by permitting unions to picket to obtain binding agreeements not to deal with non-union firms.

This issue has plagued the industry since the 1959 amendments, and the vice of the current rule is plain. This Court should provide guidance as to the extent to which such coercive conduct may be permitted under the Act.

Conclusion.

For the reasons set forth above, a Writ of Certiorari should be issued by this Court to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this matter.

Los Angeles, California
Dated: April 28, 1981

Respectfully submitted,

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APPENDICES

APPENDIX A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner vs. National Labor Relations Board, Respondent. No. 78-3469.

Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., Petitioner, vs. National Labor Relations Board, Respondent. No. 78-3487.

International Union of Operating Engineers, Local No. 701, Petitioner, vs. National Labor Relations Board, Respondent. No. 78-3619.

Woelke & Romero Framing, Inc., Petitioner, vs. National Labor Relations Board, Respondent, Carpenters Local No. 944 and Carpenters Local No. 235, Intervenors. No. 78-3468.

National Labor Relations Board, Petitioner, vs. Carpenters Local No. 944, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Respondent. No. 79-7011.

Petitions for Review of Orders of the National Labor Relations Board. Argued and submitted October 16, 1980.

Before: Browning, Chief Judge, Choy, Wallace, Sneed Anderson, Schroeder, Fletcher, Farris, Nelson, Canby and Norris, Circuit Judges.

Filed: April 17, 1981.

CANBY, Circuit Judge.

These cases raise important questions concerning the scope of § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), which prohibits "hot cargo" agreements. The primary issue is whether the construction industry pro-

viso to § 8(e) renders lawful clauses in collective bargaining contracts forbidding the employers to subcontract work at any construction site to a firm not having a contract with the signatory union. Additional issues are whether unions may picket or strike to induce an employer to enter these agreements and whether the agreements, once entered, may be enforced by picketing or strikes. We conclude that the subcontracting clauses fall within the construction industry proviso and consequently do not violate § 8(e). We also conclude that unions may picket or strike to obtain such agreements, but not to enforce them. The orders of the National Labor Relations Board are accordingly enforced.

I.
FACTS.

Two orders of the Board are under review here pursuant to 29 U.S.C. § 160(e) and (f). The first concerns a collective bargaining agreement between Oregon-Columbia Chapter of the Associated General Contractors of America, Inc., (AGC) and Local 701 of the International Union of Operating Engineers (Engineers). AGC is an association of some 200 employers engaged in construction in Oregon and southwest Washington. These employers have delegated their collective bargaining authority to AGC. AGC and Engineers entered into a collective bargaining agreement effective from June 1, 1975, through May 31, 1980, which contained the following clause:

> Article VIII
>
> Subcontractors and Other Employers.
>
> *Section 1.* Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

Subsequent clauses[1] provide for a grievance procedure leading to arbitration and further provide that should the parties fail to comply with the arbitrator's decision, then "[e]ither party may take such action as they deem necessary to enforce the findings. . . ." The effect of the latter provision is to permit either party to employ self-help, such as strikes or lockouts, that would otherwise be prohibited by another article of the agreement.

Upon complaint by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Engineers and AGC were charged with violating § 8(e)[2] of the National

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[1]Other relevant clauses of the AGC agreement are:

ARTICLE IX
Settlement of Disputes
Grievance Procedure

Section 1. In the settlement of disputes arising out of a violation, misunderstanding or difference in interpretation of this agreement, the following procedure shall be followed:

* * * *

Section 5. Should the parties involved fail to comply with the [arbitrator's] findings within five (5) days after such written notification by either party . . ., then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings . . . and they shall not be considered in violation of any part of this Agreement.

ARTICLE X
Strikes and Lockouts

Section 1. Unless otherwise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement. . . .

[2]Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work . . . .

Labor Relations Act, which prohibits agreements between a labor organization and an employer in which the employer agrees to refrain from using the products of another employer or to cease doing business with any other person. The case was submitted to the Board upon stipulated facts and the Board found that, while the agreement fell within the prohibition of § 8(e), it was exempted from the coverage of that provision by the construction industry proviso applicable to agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ." The Board also ruled that the clause authorizing enforcement of the subcontracting provision by self-help was invalid. All parties petitioned for review and the Board sought enforcement of its order.

The second decision of the Board concerns Woelke and Romero Framing, Inc., (Woelke), a framing subcontractor in the construction industry in Southern California. Woelke was a party to a collective bargaining agreement entered on July 5, 1974, with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), a group which included Locals Number 235 and 944 involved in this litigation. That agreement expired on June 15, 1977. From about June 3, 1977, to August 4, 1977, Carpenters and Woelke engaged in collective bargaining for the purpose of negotiating a successor agreement. They broke off negotiations when they reached an impasse over several issues.[3] One such issue was the union's demand for a clause

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[3]Another issue over which the parties reached impasse was Carpenters' demand to include Woelke's foremen in the bargaining unit. The Board found that picketing to enforce this demand violated § 8(b)(1)(B) of the Act. The union has not contested that ruling in this court. We therefore enforce the Board's order concerning this issue.

in the contract that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement."[4] In support of Carpenters' demand for this contract provision, Locals 235 and 944 picketed Woelke's construction sites, causing some work stoppages. The two locals were charged with violation of § 8(b)(4)(i) and (ii)(A) of the Act[5] for picketing to require

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[4]The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

[5]Sections 8(b)(4)(i) and (ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i) and (ii)(A) and (B), provide:

> (b) It shall be an unfair labor practice for a labor organization or its agents —
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

an employer "to enter into any agreement which is prohibited by section 8(e)."

The case was submitted to the Board upon stipulation and the Board found that the proposed subcontracting agreement was not prohibited by § 8(e) because it fell within the construction industry proviso, and that picketing to obtain such a clause therefore did not violate § 8(b)(4). Woelke petitions for review of the Board's order, and the Board seeks enforcement.[6]

Both decisions of the Board were reviewed by a panel of this court. 609 F.2d 1341 (9th Cir. 1979). On the authority of *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), the panel held that the subcontractor clauses were prohibited by § 8(e) and did not fall within the protection of the construction industry proviso because their applicability was not limited to jobsites where members of the signatory union were employed at some time during the construction project. Having found the present clauses unenforceable, the panel did not reach the questions whether picketing or striking either to obtain or enforce a lawful subcontractor clause would violate § 8(e). 609 F.2d at 1351. This court subsequently ordered rehearing before a limited en banc panel as provided by Public Law 95-486, 92 Stat. 1629, 1633 and Rule 25 of this court.

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[6]Along with the present cases, reported at 239 N.L.R.B. 274 (*Pacific Northwest*) and 239 N.L.R.B. 241 (*Woelke*), the Board decided *Los Angeles Building & Construction Trades Council* (*Donald Schriver, Inc.*), 239 N.L.R.B. 264 (1978), and *Colorado Building & Construction Trades Council*, 239 N.L.R.B. 253. The Board's order upholding broad subcontractor agreements in *Schriver* was enforced by the District of Columbia Circuit in an extensive and instructive opinion by Judge Edwards. *Donald Schriver, Inc. v. NLRB*, Nos. 78-2177, 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

II.
ISSUES.

Four issues are presented for determination in these cases:

(1) Are the subcontracting clauses "secondary" and therefore within the scope of § 8(e)?

(2) If the clauses are within the scope of § 8(e), are they exempted from its proscription by the construction industry proviso?

(3) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) for a union to picket or strike to induce an employer to agree to one?

(4) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) to enforce them by picketing or strikes?

III.
APPLICABILITY OF § 8(e).

The subcontractor clauses in the present case clearly require the signatory employer to cease or refrain from using the products of another employer or to cease doing business with another person. The clauses consequently fall within the literal language of § 8(e). In *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), however, the Supreme Court held that § 8(e) is not to be read as expansively as its language seems to indicate. The Court pointed out that the purpose of Congress in enacting § 8(e) was to prohibit voluntary arrangements that reached the same result as coercive secondary boycotts prohibited by § 8(b)(4)(ii)(B) of the Act. The Court therefore held that an agreement between a union and an employer which prohibited certain kinds of subcontracting was permissible so long as the objective was to preserve work traditionally performed at the jobsite by employees of the primary employer. Such a "work preservation" clause was viewed as

primary and therefore did not constitute an unfair labor practice.[7] The test whether an agreement was primary and permissible was "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *Id.* at 645. An agreement was secondary and prohibited when "the agreements and boycotts were tactically calculated to satisfy union objectives elsewhere." *Id.* at 644.

By the *National Woodwork* test, union signatory clauses such as those in issue here are secondary in objective. They do not seek to preserve work for the employees of the contracting employer by limiting the amount of subcontracting. Nor do they seek to protect the wage and benefit standards of those same employees in their present employment by merely limiting subcontracting to third parties who maintain equivalent standards. Instead, these union signatory clauses permit unlimited subcontracting so long as the subcontractors have an agreement with the contracting union. Such clauses are properly viewed as secondary, for they are intended to satisfy union objectives involving employees and employers outside of the bargaining or work unit. *Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1977); *NLRB v. National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

It is contended by Engineers that the objective of preserving work within the entire multi-employer bargaining

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[7] "Union standards" clauses, which require that an employer not subcontract with anyone whose wage and benefit scale does not meet union standards, have also been held primary. The purpose of such clauses is deemed to be protection of the pay and benefit scales of the workers of the primary employer. *Truck Drivers Union Local No. 413 v. NLRB*, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964); *NLRB v. National Maritime Union*, 486 F.2d 907, 912 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

unit of AGC is a primary goal and that this fact should take its subcontracting clause outside of the scope of § 8(e). This argument fails for two reasons. First, the clause in question does not limit subcontracting to firms that are members of AGC. Outsiders having an agreement with Engineers are eligible, even though they and their employees are wholly foreign to the multi-employer bargaining unit. The clause therefore is not a primary work preservation clause. *NLRB v. National Maritime Union*, 486 F.2d at 914. Second, § 8(e) applies in any event to an agreement which attempts to preserve work for an entire multi-employer unit rather than for single employers' employees. This court dealt with the issue in *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (9th Cir. 1964):

> Respondents seem to argue that [the clause] falls within the exception to section 8(e) because it preserves the job opportunities of employees within the multi-employer bargaining unit by prohibiting subcontracting to any employer outside that unit. But if this argument were accepted, the exception to section 8(e) would permit precisely what the section itself was intended to prohibit: An agreement by an employer to boycott another unless the latter entered into a union contract.

Accord, NLRB v. National Maritime Union, supra.

The union's further contention that work preservation for the employees of each contractor was one of the objectives underlying the union subcontracting clause, does not compel us to alter our conclusion. Regardless of the union's other objectives, if "*an object* of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful." *National Maritime Union*, 196 N.L.R.B. 1100, 1101 (1972), enforced, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974) (emphasis supplied).

It is true that the primary-secondary distinction is particularly difficult to maintain in the construction industry, where contractors and subcontractors assemble their work forces for specific short-term jobs. There is a great deal of flexibility and interchangeability of employees between bargaining units. As a result, a subcontractor clause may well serve the interests of union members in the primary bargaining unit who may later find themselves working for a subcontractor. While we believe that fact to be of great significance for purposes of determining the scope of the construction industry proviso, we do not view it as determinative of the initial applicability of § 8(e) itself. *See NLRB v. National Maritime Union, supra*, at 913-14. The primary-secondary distinction between separate employers working the same jobsite in the construction industry has been adhered to in the past, *NLRB v. Denver Building & Construction Trades*, 341 U.S. 675 (1951), and we do not feel free to disregard it here. Moreover, the consequences of viewing union signatory clauses as primary would be not only to remove them from the scope of § 8(e) but also to remove picketing to enforce such agreements from the prohibition of § 8(b)(4)(ii)(B). For reasons stated in Section VI of this opinion, we believe that permitting coercive enforcement of union signatory clauses would be contrary to the intent of Congress.

We accordingly hold that the union signatory clauses in these cases are secondary and within the scope of § 8(e). Their validity consequently depends upon their eligibility for inclusion within the construction industry proviso to that section.

IV.

SCOPE OF THE CONSTRUCTION INDUSTRY PROVISO TO § 8(e).

In order to ascertain the scope of the construction industry proviso, it is necessary to examine its legislative history in the light of the practices existing in the industry at that time

and the law then applicable. In so reviewing the origins of the 1959 Landrum-Griffin Act of which § 8(e) and its proviso were a part, we recognize that our initial conclusions as to its meaning are subject to any modifications or corrections that may be compelled by a fair reading of *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Indeed, it is the effect of *Connell* that provides the primary ground of controversy in the present litigation. We believe, however, that the *Connell* decision is best analyzed after a review of the state of the industry and the legislative and administrative history of the proviso governing it.

(A) Construction Industry Background.

The primary characteristics which differentiate the construction industry from most others are well stated in the Senate Report on the 1959 amendments:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959); 1 *Legislative History of The Labor-Management Reporting and Disclosure Act of 1959* 423 (hereinafter Leg. Hist.). These peculiarities of the construction industry created special problems for both unions and employers long before 1959. Unions had to overcome difficulties of organizing temporary workers and of maintaining wage and benefit standards in unstable employment conditions. Employers required a ready source of skilled workers available for each new job, and had to be able to forecast labor costs accurately. To satisfy these needs, unions and employers ham-

mered out a number of mutual accommodations. One such arrangement was the closed shop, which was prevalent in the industry by the 1920's.[8] A second was negotiation of area-wide agreements covering all construction work of a certain type, with multiple contracting employers agreeing to the standards set in those agreements.[9] Of necessity, these contracts dealt with wages, hours and working conditions of employees yet to be hired for particular jobs by particular employers.[10] A third device was the agreement to restrict subcontracting in various ways — to firms maintaining union standards, or to firms that were unionized,[11] or to firms that agreed to bind themselves to contracts with the union signatory to the subcontracting clause.[12]

Some of these devices were not necessarily consistent with the organizational scheme of the National Labor Relations Act in its original form. The Act initially caused no disruption in the pattern of collective bargaining in the construction industry, however, because the National Labor Relations Board declined to exercise jurisdiction over that industry.[13] The Taft-Hartley Amendments to the Act, passed

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[8]Haber, Industrial Relations in the Building Industry 238-40 (1930). A study by the National Manufacturers Association reported that in 1926, 69% of all construction work was done under closed-shop conditions. *Id.* at 240.

[9]Dunlop, *The Industrial Relations System in Construction*, in The Structure of Collective Bargaining 255, 256-57 (Weber ed. 1961).

[10]S. Rep. No. 187, *supra*, 28; 1 Leg. Hist. 424. *See generally*, Labor-Management Reform Legislation, Hearings before the Subcommittee on Labor of the Committee of Labor and Public Welfare, United States Senate (hereinafter Senate Hearings), 86th Cong., 1st Sess. 136 (testimony of Professor Cox).

[11]A union to limit subcontracting to union firms was held exempt from the antitrust laws as early as 1934. *Levering & Garrigues Co. v. Morrin*, 71 F.2d 284 (2d Cir.), *cert. denied*, 293 U.S. 595 (1934).

[12] Marcus, *Secondary Boycotts*, in Symposium on the Labor-Management Reporting Disclosure Act of 1959, 822, 824 (Slovenko ed. 1961)(hereinafter referred to as LMRDA Symposium).

[13]*Brown and Root, Inc.*, 51 N.L.R.B. 820 (1943; *Johns-Manville Corp.*, 61 N.L.R.B. 1 (1945).

in 1947, led to a reversal of the Board's position. Those amendments prohibited striking or picketing to coerce an employer to refrain from dealing in the products of any other employer or to cease to do business with any other person. § 8(b)(4)(A).[14] Subsequent to the amendments, the Board's General Counsel determined that the construction industry would be regulated by the Board.[15]

One effect of applying the amended Act to the construction industry was the invalidation of collective bargaining agreements entered before any employees were hired on the job. *Guy F. Atkinson Co. and J.A. Jones Construction Co.*, 90 N.L.R.B. 143 (1950), *enforcement denied on other grounds*, 195 F.2d 1 (9th Cir. 1952). The amended Act was also applied to prohibit a construction union from picketing a jobsite in order to force the general contractor with whom it had a collective bargaining agreement to cease doing business with a particular subcontractor on the job whose employees were non-union. *NRLB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951). The

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[14]The relevant portions of § 8(b)(4)(A) are now in § 8(b)(4)(ii)(B), quoted in note 4 *supra*.

[15]Denham, *Taft Act's Impact on the Construction Industry, reprinted in* 21 L.R.R.M. 44 (1948). The Board's decision to exercise jurisdiction over the industry following passage of the Taft-Hartley Amendments resulted, in part, from the Amendments' prohibiting the closed shop and "back up crews" (featherbedding), two accepted practices in the construction industry. Despite the General Counsel's action, the Taft-Hartley Act was virtually ignored within the construction industry until the Board decided *United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Industry (Brown-Olds)*, 115 N.L.R.B. 594 (1956), and *Mountain Pacific Chapter of Associated General Contractors Inc. (Mountain-Pacific)*, 119 N.L.R.B. 883 (1958), *remanded on other grounds*, 270 F.2d 425 (9th Cir. 1959).

Apruzzese, *The LMRDA and the Building and Construction Industry*, LMRDA Symposium, note 12, *supra*, 1019, 1029. Thereafter the General Counsel granted a moratorium to the construction industry to allow it to bring its hiring hall practices into line with the provisions of the Taft-Hartley Act. *See* Fenton, *Union Hiring Halls: NLRB Rules, Penalties*, 42 L.R.R.M. 101, 103 (1958).

picketing was found to violate § 8(b)(4)(A)'s prohibition of coercive secondary boycotts.

These applications of the amended National Labor Relations Act to the construction industry were sufficiently disruptive of existing practices that there was agitation for modification of the Act, particularly in regard to prehire practices and secondary activity. In 1954, President Eisenhower called for amendments to permit prehire agreements and to shorten to 7 days the time by which a nonunion worker could be required to join a union under a union-shop agreement. 100 Cong. Rec. 111, [1954] U.S. Code Cong. & Admin. News 1532. Again in 1959, when calling for amendments to tighten the prohibition against secondary boycotts, the President added that provisions were needed "to make clear that secondary activity is permitted . . . under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer." S. Doc. 10, 86th Cong., 1st Sess.; 105 Cong. Rec. 1297; I Leg. Hist. 82.

Accommodation to the special conditions of the construction industry was consequently an important consideration that found expression in the 1959 amendments to the Act. Those amendments, however, also embodied another major goal of Congress at the time—that of limiting "hot cargo" agreements.

In June 1958, the Supreme Court had decided *Local 1976, United Brotherhood of Carpenters v. NLRB*, (*Sand Door*), 357 U.S. 93. *Sand Door* stated that a union did not violate § 8(b)(4)(A) by securing the voluntary participation of an employer in a boycott of another employer's product. Although the Court said it found no occasion to determine the legality of "hot cargo" clauses (by which an employer agreed to boycott nonunion firms) as such, *id.* at 107, *Sand*

Door was widely interpreted as permitting them. The decision was seen as creating a loophole in the Act, and it contributed heavily to the move toward amending the secondary boycott provision of the Act.

(B) The Landrum-Griffin Amendments and § 8(e).

The 1959 revisions of the Act accomplished the congressional purposes in various ways. The clearest accommodation to the peculiar conditions of the construction industry was found in § 8(f),[16] which authorized unions and employers in that industry to enter prehire agreements fixing terms and conditions of employment of workers yet to be hired. This provision amounts to an exception to §§ 8(a)(1), (2) and 8(b)(1)(A), which make it an unfair labor practice for both the employer and the union to enter a collective

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[16]Section 8(f), 29 U.S.C. § 158(f), provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment, or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

bargaining agreement before the union represents a majority of employees in the unit. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961); *see NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 344-45 (1978). Section 8(f) also shortened to 7 days the period for non-union workers to join the union under the union-shop agreement.

Conflicting policies were reflected clearly in the passage of § 8(e), which was intended to narrow or close the loophole for "hot cargo" agreements created by the *Sand Door* decision. The Senate bill prohibited such agreements only in the trucking industry,[17] while the House bill outlawed them everywhere.[18] The Conference Committee adopted the House version, but added the provisos creating exceptions for the garment and construction industries.[19] The garment industry exception was unlimited as to time and place,[20] while the construction industry proviso excepted agreements "relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work. . . ."

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[17]S. 1555, 1 Leg. Hist. 582.

[18]H.R. 8342 as amended by H.R. 8400, 1 Leg. Hist. 683.

[19]H.R. Rep. No. 1147 (Conference Report) 86th Cong., 1st Sess. 38-40; 1 Leg. Hist. 942-44 (1959).

[20]The garment industry proviso to § 8(e), 29 U.S.C. § 158(e), states:

> *Provided further*, That for the purpose of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry. . . .

It is the nature and meaning of the construction industry proviso's restriction to the jobsite that gives rise to the present controversy. The contractors assert that the proviso is intended to authorize subcontracting clauses in collective bargaining agreements only when union workers are present at the jobsite, so that the presence of nonunion workers there might lead to friction. The unions claim that the intent was to authorize subcontracting clauses whether or not union workers were at the jobsite, so long as the clauses refer to work to be performed at the construction site. Although the matter is not free from doubt, we believe that the legislative history favors the latter view.

(C) Legislative Discussion of the Construction Industry Proviso.

The legislative history regarding the construction industry proviso is much less exhaustive than that surrounding the garment industry proviso,[21] but there are nevertheless indications of congressional intent in the records. Senator Kennedy, the chairman of the Conference Committee, said of the two provisos, that "[b]oth changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries." 105 Cong. Rec. 17899; II Leg. Hist. 1432. Unlike the garment industry, the construction industry was not exempted from the provisions of § 8(b)(4) that prohibited striking or picketing to coerce a secondary boycott; it was merely exempted from § 8(e)'s prohibition of agreements between a union and an employer by which

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[21]There is a substantial explanation in the legislative history of the highly integrated subcontracting arrangements in the garment industry and the problem of "sweatshop" conditions. *See, e.g.*, 105 Cong. Rec. 17381, II Leg. Hist. 1385 (Senators Javits and Goldwater); 105 Cong. Rec. 15538, II Leg. Hist. 1576 (Memorandum of Reps. Thompson and Udall); 105 Cong. Rec. 15848; II Leg. Hist. 1680 (Rep. Teller).

the employer would boycott others. The Conference committee stated its intent in regard to the proviso as follows:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. . . . To the extent that such agreements are legal today under section 8(b)(4) . . ., the proviso would prevent such legality from being affected by section 8(e).

H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39; I Leg. Hist. 943. Senator Kennedy analyzed the proposed § 8(e) as follows:

> The first proviso under new § 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
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> . . .
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> *Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under § 8(e).*
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> *It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.*

105 Cong. Rec. 17900; II Leg. Hist. at 1433 (emphasis supplied).

As Senator Kennedy made clear, unions continued to be forbidden to picket or strike at a construction site for secondary objectives, which meant that the holding of *Denver Building Trades, supra*, was left in effect. On the other hand, the Conference Report and Senator Kennedy made it equally clear that unions and employers could enter subcontracting agreements as permitted by law prior to the enactment of the new § 8(e).

It seems more likely than not that the "present law" referred to by the Conference Committee did not restrict the agreements that Senator Kennedy said "appear to be legal" to jobsites where union workers were present. The *Sand Door* decision, *supra*, which supplied much of the impetus for § 8(e), had legitimized secondary boycotts the objectives of which clearly went beyond the mere avoidance of shoulder-to-shoulder friction between workers. It is true that the construction industry proviso narrowed the geographical scope of the *Sand Door* rule by introducing the jobsite limitation, but we do not interpret the words of the proviso as indicating an intent to narrow the substantive scope of the *Sand Door* rule on the jobsite.

It should be noted that shortly before enactment of the proviso, the District of Columbia Circuit had upheld a subcontractor agreement the terms of which were as broad as those presently in issue. *Operating Engineers Local Union No. 3 v. NLRB*, 266 F.2d 905 (D.C. Cir.), *cert. denied sub*

nom. St. Maurice v. NLRB, 361 U.S. 834 (1959).[22] While that case dealt with an interunion dispute, the terms of the secondary agreement were not restricted to that or any other situation of jobsite conflict. In upholding the agreement the Court referred to the Board's reasoning "that the preclusion of future work to a prospective subcontractor in the circumstances did not justify the Board in holding that the rights of unidentified employees of such prospective employer were adversely affected." 266 F.2d at 908.

Moreover, a survey of major labor contracts in existence in 1959 revealed that more than 50 of them contained clauses restricting subcontracting to firms complying with the terms of the prime employer's agreement. Lunden, *Subcontracting*

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[22]The *Engineers* decision was submitted to the House Committee investigating labor practices as part of the testimony of Paul H. Robbins, Executive Director of the National Society of Professional Engineers. 2 Hearings Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H.R. 3540, H.R. 3302, H.R. 4473 and H.Rf. 4474 and Related Bills Regarding Labor-Management Reform Legislation, 803-07 (1959) (hereafter House Hearings).

In addition, Edward M. Carlton, office manager of St. Maurice, Helkamp and Musser, the subcontractor involved in *Engineers*, appeared before the Committee and testified as to the scope of the subcontracting clause:

> The Contract also contains a clause which is referred to in the industry as the subcontractor clauses. In effect, that clauses (sic) says that any time an AGC contractor subcontracts work the subcontractor must agree to apply the terms and conditions of the AGC Operating Engineers' agreement to his employees. This, of course, means that the subcontractor's employees must become members of Operating Engineers local 3.
>
> Since about 1955, the AGC and the Operating Engineers *have enlarged the subcontractor clauses so that an AGC contractor will not subcontract any work unless the subcontractor agrees in advance to be bound by the AGC Operating Engineers' agreement.*

5 House Hearings 2366 (Emphasis supplied).

Although the *Engineers* decision was not directly referred to in the Senate Hearings, the problem of union signatory clauses was brought to the committee's attention. Senate Hearings 752 (Testimony of Sen. Curtis).

Clauses in Major Contracts, 84 Monthly Labor Review 579 (Part I), 715 (Part II) at 715 (1961). While the survey does not adequately differentiate between union signatory clauses and union standards clauses, it is nevertheless clear that numbers of broad subcontractor agreements were in existence.[23] The survey canvasses various limitations appearing in subcontracting clauses in the construction industry, but makes no mention of any restrictions to the jobsite or references to the problem of friction between union and nonunion workers there. *Id.* at 715-16. That there may not have been a consistent pattern of subcontractor agreements of the type in issue here is not crucial. What does emerge from the contemporaneous scene is that some such agreements existed and were legal and that Congress did not appear to intend a change in that condition.

V.

(A) The Connell Decision.

It was against this industrial and legislative background that the Supreme Court decided *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). *Connell* was an antitrust suit brought by a general contractor against a union that was picketing in order to coerce the contractor to enter an agreement to deal only with subcontractors having a collective bargaining agreement with the union. The union expressly disclaimed any interest in representing the general contractor's employees.

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[23]Office of the General Counsel, Memorandum 76-57, December 15, 1976, *reprinted in* Labor Relations Yearbook 1976, p. 295. Because Lunden failed adequately to distinguish between union signatory and union standards clauses, the General Counsel found that study "inconclusive." *Id.* at 308. The General Counsel's own study concluded that there was no "pattern" of collective bargaining in the industry, but that the existing clauses constituted only a "mosaic." Union signatory clauses, not restricted to a particular jobsite, were part of that mosaic. *Id.* at 309.

The picketing was successful and the contractor sought to annul the ensuing agreement on the grounds that it violated the antitrust laws.[24] One of the defenses raised by the union was that the agreement could not be a violation of the antitrust laws because it was authorized by the proviso to § 8(e) of the National Labor Relations Act. The Supreme court rejected that defense and held that broad subcontracting agreements applicable to every jobsite where the general contractor might hire subcontractors were invalid when entered outside of the context of a collective bargaining relationship between the union and the general contractor.

The employers who attack the subcontracting clauses in the present case argue that *Connell's* language necessarily requires a conclusion that subcontracting clauses are permissible only when they serve the purpose of avoiding jobsite friction between union and nonunion workers employed at the same jobsite. So interpreted, *Connell* would invalidate the agreements in issue here at least until the presence of

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[24]*Connell* was another chapter in the dispute in Dallas between building contractors and trade unions. In *Dallas Building & Construction Trades Council v. NLRB*, 396 F.2d 667 (D.C. Cir. 1968), a clause similar to the one in *Connell* was at issue. Unlike *Connell*, however, the general contractor that was picketed had nonunion employees. Although the Trades Council expressly disavowed any interest in organizing the general contractor's workers, both the Board and the District of Columbia Circuit Court of Appeals concluded otherwise. The court held that because there was an organizational objective the picketing was limited to thirty days by § 8(b)(7), a period which the unions had exceeded.

The court's opinion left open the possibility of picketing more than thirty days if the unions could conclusively show no organizational objective. In order to avoid the § 8(b)(7) problem, the unions picketed contractors who had no employees of their own. The contractors sought to challenge this practice before the Board, but the General Counsel refused to issue a complaint. *See Connell*, 483 F.2d 1154, 1158 (5th Cir. 1973), and 421 U.S. at 631-32 n.10.

When Local 100 began picketing *Connell*, the contractor did not file a complaint with the Board, but immediately sued the union for violating both federal and state antitrust laws.

union workers at a particular jobsite triggered their application. We concede at the outset that the *Connell* opinion contains considerable emphasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to "top-down" organizing that is one of the effects of subcontractor agreements. Nevertheless, we believe that this reading of the *Connell* decision misconstrues the Supreme Court's view of § 8(e) and gives too narrow a scope to the construction industry proviso. We think that the prevailing thrust of *Connell* is to the contrary and favors a broader view of the exemption. Our conclusion is supported in particular by the *Connell* opinion's emphasis on the absence of a collective bargaining relationship, its references to legislative history, and its characterization of the interests served by the proviso.[25] Our view is reinforced by the adverse practical consequences that would follow from the narrower reading of the proviso. Each of these factors bears elaboration.

The first and most obvious distinction of *Connell* from the present case is that the agreements in *Connell* arose outside of the context of a collective bargaining relationship. This fact was of course crucial for antitrust purposes, because the national policy of encouraging collective bargaining has served as the basis for a judicially created labor

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[25]But for the *Connell* decision, we would have no difficulty in enforcing the Board's order. Prior to *Connell*, this court, other circuits and the Board had upheld broad subcontracting clauses in collective bargaining agreements. *See, e.g., Construction, Production & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Suburban Title Center Inc. v. Rockford Building & Construction Trades Council*, 354 F.2d 1, 2-3 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966) *United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 48*, 190 N.L.R.B. 415, 416-17 (1971).

exemption from the antitrust laws.[26] The absence of such an interest was pointedly referred to in *Connell*:

> In this case, Local 100 had an interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market.

421 U.S. at 626.[27] The focus of the *Connell* decision was therefore understandably upon the situation created by subcontracting clauses in the absence of a collective bargaining agreement with the prime contracting employer.

That focus on the part of the Court was not merely the product of the antitrust setting of *Connell*, however. The parties themselves had framed the issues toward the same end. The union contended that all subcontractor agreements were validated by the plain words of § 8(e). The employer responded by urging that "despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-

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[26]*See Connell*, 421 U.S. at 622-23; St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976). Labor unions also have a statutory exemption from the antitrust laws by virtue of sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113. These statutes declare that labor unions are not combinations in restraint of trade and exempt specific union activities including secondary boycotts from the antitrust laws and from certain kinds of injunctive relief. These statutes do not, however, exempt concerted activity or agreements between unions and non-labor parties. *Connell, supra*, 622-23. *See generally*, R. Gorman, Basic Text on Labor Law, 621-31 (1976).

[27]The fact that *Connell* was an antitrust case outside of the context of collective bargaining led to a natural emphasis by the Court on the pursuit of market efficiency through competition. This emphasis reappears in the dissent here, *infra* p. .... , but we find it far less compelling in this labor case in which no antitrust issues have been raised. The thrust of the labor laws, of course, is frequently contrary to that of the antitrust laws. *See* St. Antoine, *supra*, n. 26.

bargaining relationship . . .," but not those involving a "stranger" contractor. *Id.* at 627.[28] The subject of controversy, then, was the validity of subcontractor agreements *outside* of the collective bargaining context, and the *Connell* opinion must to a large degree be read in that light. The Court's conclusion, reached after a discussion of the legislative history and policies behind § 8(e), was clearly limited to the situation before it:

> We therefore hold that this agreement, which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite, . . . may be the basis of a federal anti-trust suit. . . .

Id. at 635. The holding of *Connell*, then, does not in the strict sense control the cases before us.

The *Connell* opinion did, however, discuss at length the reach of § 8(e) and its construction industry proviso, upon which the present cases turn. It therefore becomes necessary to interpret the language of *Connell* and apply it to the situation of the cases at bar where a collective bargaining

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[28]The briefs in *Connell* concentrated entirely on the distinction between the presence and absence of a collective bargaining relationship in determining the validity of subcontracting clauses. The policy of preventing jobsite friction was raised tangentially in the appendix to Local 100's brief which included a memorandum by the NLRB General Counsel explaining why he would not issue a complaint in a case factually similar to *Connell*. Significantly, that memorandum, dealing with Hagler Construction Co., was distinguished in the *Connell* opinion as being ". . . addressed to a different argument that a subcontracting clause should be allowed only if there is a *pre-existing* collective bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work covered by the agreement." 421 U.S. at 632 n. 10. (emphasis in original).

relationship existed between the unions and the contractors with whom the agreements were sought.[29]

A major question is whether the presence or absence of a collective bargaining relationship, obviously significant in the antitrust context of *Connell*, remains pivotal when the issue is purely one of labor law.

We believe that there is a complex of factors affecting labor relations in the construction industry that renders the collective bargaining relationship crucial in the present cases and we find the underlying policies reflected in parts of the *Connell* opinion itself. We also believe that these factors exist at the construction jobsite but are by no means limited to the problem of shoulder-to-shoulder friction between union and nonunion workers there. These two themes — the nature of the collective bargaining relationship in the construction industry and the manner in which these characteristics are exhibited at the jobsite — are interwoven in *Connell* as they are in the present controversy. We will attempt, however, to discuss them separately even though each will necessarily intrude upon the other.

The legislative history already discussed should make it clear that the outstanding peculiarity of the construction industry is that the work force of any given employer — contractor or subcontractor — is highly flexible and grows

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[29]In *Woelke*, the union had entered a three-year collective bargaining agreement with the employer and the dispute arose during negotiation to renew the contract. In *Pacific Northwest*, the union had long had a continuous collective bargaining agreement with the Association of General Contractors. We therefore need not reach and express no opinion on the question whether a "prehire" agreement entered or sought pursuant to § 8(f) of the Act is a sufficient "collective bargaining relationship" to render permissible the entry of subcontracting agreements. We note that prehire agreements were held sufficient to legitimize subcontracting agreements in *Donald Shriver Inc. v. NLRB*, Nos. 78-2177 and 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

or diminishes or even disappears depending on the temporary contracting or subcontracting arrangements at any particular jobsite. As Congress recognized in passing § 8(f), collective bargaining cannot even await the presence of workers on the job. Moreover, when there are workers already employed by a general contractor, the interests of those employees are not permanently or inevitably bound to that single employer. The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union. Under those conditions the employees and their unions are faced with severe problems not only of maintaining wage levels, but of protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions.

When a union representing a contractor's employees seeks to restrict subcontracting to firms having a collective bargaining agreement with the union, the union in fact pursues a number of objectives some of which might fairly be characterized as primary and others as secondary. The welfare of the employees in the primary bargaining unit is clearly likely to be affected by an employer's choice to hire a subcontractor who may himself employ those same employees. On the other hand, the union clearly has secondary goals that may include organizing the employees of a subcontractor who have no connection with the primary bargaining unit.

It is quite true that when a union seeks to serve the interests of employees in its bargaining unit not as employees of their existing employer, but as potential employees of some other employer, the arrangement is legally viewed as secondary. *National Woodwork, supra,* at 644-45;

National Maritime Union, supra. We do not quarrel with this well-established rule, nor with the rule that when primary and secondary objectives are combined, an agreement is regarded as secondary for purposes of the National Labor Relations Act. *NRLB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 689 (1951).

We do, however, find sufficient support in the legislative history of the 1959 Amendments to suggest that Congress was sensitive to both the primary and secondary considerations involved in subcontractor arrangements and wished not to interfere with these mixed union objectives when they could be achieved by agreement with the prime employer. Even though a construction union's interest in subcontracting at the jobsite is secondary so as to bring it within § 8(e), it is far more direct and involves the union's members in the primary bargaining unit far more than is the case when unions outside of the construction industry pursue secondary objectives.

The importance of this fact is that it renders the existence of a collective bargaining relationship highly significant. When a union represents employees of a prime contractor and seeks a subcontracting agreement, it has the interests of the employees in its primary bargaining unit at stake to at least some degree. In the *Connell* situation, the union is utterly without any objective that could be characterized as primary or direct. Because the union in *Connell* disclaimed any interest in representing the employees of Connell, all of its goals were necessarily secondary and could not be connected to any primary representational interest.

The significance of the restriction of the § 8(e) proviso to work performed at a jobsite may now become more clear. It is at the jobsite that all of the special characteristics of the construction industry are manifested. It is true that *one* of these characteristics is that union workers are traditionally

hostile to the presence of nonunion workers on the same job at the same time. But that is clearly not the only or even the major characteristic exhibited. It is at the jobsite where the general contractor can exercise the flexibility to use its own workers or those of a subcontractor, where the flexibility of subcontracting arrangements lead to multiple employers hiring a few workers for short periods of time,[30] and where working conditions applicable to one set of workers may very well affect others working on the same project.[31]

We believe that the *Connell* opinion is sensitive both to the interconnection of interests between employees of the

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[30]The 1977 Census of Construction Industries found that there were more than 288,000 "specialty trade contractors" (a category which includes fifteen different subcontracting functions). On the average, each firm employed six construction workers. U.S. Bureau of the Census, Census of Construction Industries (1977), *cited in* Statistical Abstract of the United States (1979) Table 1365, p. 776.

One commentator has aptly summarized the peculiar problems confronted by labor unions attempting to organize construction workers as well as the techniques which they have employed:

> Union insistence on having the contractor use only union men runs counter to the general theory of free determination on which the Wagner Act was based. Elections on the part of the employees are impractical, however, in an industry where the employment may be over before an election can be held, and where the employees on the next job may be a substantially different group. It would be literally impossible to maintain a union if the men had to be organized anew each time they went to a new job. The industrial union can afford the luxury of indifference as to whom the employer hires because the important thing is to organize the employees once they are on the job. The building trade union cannot operate efficiently unless it can require the employer to hire its members in the first place.
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> . . .
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> [B]uilding trade unions [therefore] have not organized employees by techniques familiar to manufacturing. Instead, the construction unions have, in effect, organized the employers. An agreement with the employer that he will hire only union members is much the most effective way to standardize working conditions in an industry where jobs are so fluid.

Fleming, *The Building Trades and Title VII of LMRDA*, in LMRDA Symposium, *supra*, note 12, at 1034, 1043.

[31]*See Donald Schriver Inc., supra*, slip op. at 43-46.

various contractors and subcontractors and to the broad manner in which any or all of these factors may be exhibited at the jobsite. In dealing with the legislative history of the construction industry proviso, the opinion in *Connell* points out that the proviso was "explained only by bare reference to 'the pattern of collective bargaining' in the industry." 421 U.S. at 628-29. The legislative history discussed above indicates, we believe, that the pattern of collective bargaining included broad subcontracting agreements. To the extent that the just-quoted comment in *Connell* dismisses the history regarding the pattern of collective bargaining, it may well be explained by the fact that *Connell* was dealing with a case not considered by Congress, in which there was no collective bargaining relationship.[32]

In any event, the subsequent language of the *Connell* opinion appears quite clearly to encompass the multiple considerations affecting the construction industry at the jobsite. The opinion suggests that the construction industry proviso may have been adopted "as a partial substitute for an attempt to overrule" *Denver Building Trades*, 421 U.S. at 629. *Denver Building Trades* had outlawed the picketing of a contractor at a jobsite in order to force it to cease doing business with a nonunion subcontractor working there. The *Connell* opinion refers to congressional discussion of special problems in the construction industry related both to the §

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[32]In *Connell*, the Fifth Circuit requested that the parties and their amici submit supplemental briefs concerning the pattern of bargaining practices at the time of the 1959 amendments. The union was unable to provide any information which would allow the conclusion that stranger clauses were part of the pattern and that Congress therefore intended to preserve this practice. 483 F.2d at 1182 (dissenting opinion). Such is not the case with regard to particular union clauses. The decision of the District of Columbia Circuit in *Operating Engineers*, *supra*, as well as the House and Senate Hearings, *supra*, note 24, suggest that Congress was well aware of the existence of these clauses.

8(e) proviso and to the attempt to overrule *Denver Building Trades*. That discussion, according to the Court, "focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcontractors at the jobsite." *Id.* at 629-30. The Court's footnote to this statement refers to legislative history that clearly goes beyond the problem of shoulder-to-shoulder conflict between union and nonunion workers at the jobsite. The first excerpt referred to is by Senator Morse whose statement includes the following:

> The secondary boycott ban is based upon the concept of two employers — a primary and a secondary employer. The theory is that a neutral employer should not be compelled to suffer because of a labor dispute the union has with somebody else, but the theory breaks down when the two employers are "allies." Senator Taft said that the secondary boycott section "is not intended to apply to a case where the third party is, in effect, in cahoots with, or acting as a part of, the primary employer."[33] The National Labor Relations Board and the courts have failed to keep Senator Taft's concept in mind. The Board has considered subsidiaries to be separate employers. Other enterprises, substantially controlled by the same persons, have been considered separate employers, even though one manufactured a product incorporated into the finished article produced by the other.
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> The case of the building and construction industry represented probably the most flagrant injustice, where

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[33]Senator Taft's remarks were part of a colloquy with Senator Ives on June 30, 1949, 95 Cong. Record 8709. Senator Taft was referring to the garment industry, but he cited for his proposition a case that involved the construction industry: *Douds v. Metropolitan Federation of Architects, Engineers, Chemists & Technicians, Local 231, (Project Engineering Co.,)*, 75 F. Supp. 672 (S.D.N.Y. 1948).

> a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a site which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations. He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies. He is not acting in the dark, Mr. President. He is not innocent of any unfair labor policies on the part of a subcontractor.

105 Cong. Rec. 17880-81; II Leg. Hist. at 1425. Even where the sources cited by *Connell* deal with union workers at the jobsite, they reflect a number of interests of the union that affect members of its own bargaining unit as well as the members in secondary employ. The memorandum by representatives Thompson and Udall is illustrative:

> Where all the men are employed on the same project, the division into different trades or crafts, each with its own employer, must not be allowed to obstruct their common interests—they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeles. The illegality of such a boycott would not be affected by the amendment.
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> . . . [A] reason for outlawing secondary boycotts is that they drag neutral employers into disputes in which they have no interest. Where all the employers affected are bound together in the common work of putting up a single building, none is truly neutral. The undertaking is so integral that each is affected by and can influence the conduct of the others.

105 Cong. Rec. 15541; II Leg. Hist. 1577. These materials cited by the *Connell* Court suggest a number of reasons why Congress may have wanted to restrict the construction industry's use of subcontracting agreements to work done on a jobsite. These sources do not limit themselves to and, indeed, place very little emphasis on, the problem of shoulder-to-shoulder friction between union and nonunion workers actually present at the jobsite.

The *Connell* opinion quotes *National Woodwork Manufacturers, supra,* to the effect that the construction industry proviso is "designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." 421 U.S. at 630, quoting 386 U.S. at 638-39. It is clear that the *Connell* opinion views the jobsite considerations of *National Woodwork* as going well beyond the problem of friction among workers,[34] because *Connell* next refers to some courts that have suggested that the proviso serves an "even narrower function" — the alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Id.* at 630, quoting *Drivers Local Union No. 695 v.*

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[34]Indeed, *National Woodwork* contains a footnote reference succeeding the discussion of the "close community of interests" on the jobsite. 386 U.S. at 639 n. 32. That footnote refers to *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964), which does deal with shoulder-to-shoulder friction. It also refers, however, to a Yale Law Journal Comment. *The Impact of the Taft-Hartley Act on the Building and Construction Industry*, 60 Yale L.J. 673, 684-89 (1951), which discusses not only jobsite friction but also the additional considerations of interchangeability of workers, short time span, flexible contracting arrangements, and numerous other interests that a union representing a primary group of employees may have in the employment arrangements of other employers at the jobsite.

NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966). The *Connell* opinion does not adopt this "even narrower" reading of the proviso, and indeed finds it unnecessary to treat the matter further because in the *Connell* case the union did not purport to represent *any* of the interests served by the proviso. 421 U.S. at 631.[35]

We believe that it would do some violence to the language of the *Connell* opinion to adopt the "even narrower" view of the construction industry proviso which the Court in *Connell* did not represent to be its own. Yet this consequence would follow from restricting the applicability of subcontractor agreements to those instances where shoulder-to-shoulder jobsite friction can occur. Instead, we think that it is more in accord with the language of *Connell* to permit those agreements to apply to any jobsite at which an employer with a collective bargaining relationship with the union is a contractor.

We concede that the language of the *Connell* opinion dealing with congressional antagonism to "top-down organizing" may well lean in a direction contrary to our views. We think it is countered by *Connell's* recognition of other vital concerns of collective bargaining in the construction industry reflected in the community of interest at the jobsite.

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[35]Essentially the same situation was dealt with by this court in *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975). *ACCO* does contain language tending to restrict the jobsite proviso to the goals of avoiding shoulder-to-shoulder friction, but we do not read that as essential to its decision. *ACCO* was written before *Connell* and it dealt with what were essentially off-site workers who only occasionally worked on-site. They and their employers were not at all involved in the "community of interests" which are emphasized in *National Woodwork*, *Connell*, and this opinion. The union's objectives in organizing such off-site workers were indirect and wholly secondary; the primary interests of workers in the bargaining unit at the jobsite could not be directly affected by, and were not interchangeable with, the off-site workers.

There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job next to nonunion workers, the enforcement of a subcontracting clause is still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.[36]

The *Connell* opinion's condemnation of the "unlimited" top-down organizing weapon with which it was confronted must be read in the context of the applicable factual and statutory framework. Because the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited to the 30 days established for organizational picketing under § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell. If the subcontractor clause were held to be legitimate, there would be no limit at all to the coercive force the union could apply. The decision in *Connell* solved this problem by holding that the subcontracting agreement was an unlawful goal when it was sought outside of a collective bargaining context.

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[36]Because the proviso *is* an exception to the 1959 amendments, we cannot accept the test for its interpretation adopted at the conclusion of the dissent. The issue is not which interpretation is the more faithful to Congress' overall goal in the 1959 amendments of curbing "top-down" organizing. Instead, the question is which interpretation best effectuates Congress' accommodation of the conflicting objectives of curbing "top-down" organizing and of protecting collective bargaining under the peculiar conditions of the construction industry.

The situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. The existence of a collective bargaining relationship therefore avoids the "unlimited" nature of the organizational tool involved in *Connell*, where a stranger contractor was powerless to resist unlimited coercion by any means other than signing the demanded subcontractor agreement.

Finally, in summarizing the proviso's effect, the *Connell* Court stated:

> [W]e think its authorization extends only to agreements in the context of collective bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.

421 U.S. at 633. While it might be susceptible to another reading, we interpret this language to mean that the existence of a collective bargaining relationship *clearly* brings a union signatory subcontracting agreement within the proviso to § 8(e) and that in the absence of a collective bargaining relationship, it is possible that such an agreement may be valid where the union actually has workers on the job that

may be threatened with shoulder-to-shoulder friction.[37] We consequently believe that the quoted summary supports our conclusion that *Connell* does not deny the protection of the proviso to the subcontractor agreements in the present cases.

(B) Practical Consequences.

Our reading of *Connell* to permit broad subcontracting clauses within a collective bargaining relationship not only accords with the apparent thrust of the legislative history, it is supported by the severe practical limitations attending a contrary conclusion. Limitation of subcontracting agreements to sites where there may be shoulder-to-shoulder conflict between union and nonunion workers presents immense practical problems. If unions are confined to negotiating these agreements only when they find that there are union employees on the jobsite, then they must inventory and negotiate over an incredible number of jobsites. AGC itself represents some 200 general contractors. The number of jobsites at which they contract is unquestionably a multiple of that figure. Jobsite by jobsite negotiation of subcontract-

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[37]Our reading of the quoted language in *Connell* as presenting disjunctive alternatives rather than conjunctive and cumulative requirements is supported by the District of Columbia Circuit and probably by the Third Circuit. *Donald Schriver, Inc., supra; Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council*, 609 F.2d 1368, 1374-75 (3d Cir. 1979) (en banc). Lower courts and commentators have varied in their approach to the underlying issue. *See Landscape Specialties, Inc. v. Laborers' International Union, Local 806*, 477 F. Supp. 17 (C.D. Cal. 1979); *Long v. Floorcraft Carpet Co.*, 82 Labor cases ¶ 10,044 (D. Or. 1977); St. Antoine, *supra*, 62 Va. L. Rev. at 619; Janofsky & Hay, *Connell — Consistent with Past, Indicative of Future*, Proceedings of N.Y.U. Twenty-Ninth Annual Conference on Labor 3, 21-22 (1976).

Normally, a union without a collective bargaining relationship that seeks a subcontracting clause will be pursuing no interest that could impact upon its primary representation of anyone. The rare exception might occur when the union has its own employees working for some other employer on the jobsite and shoulder-to-shoulder friction threatens.

ing agreements would seem burdensome to the point of impossibility. It also appears to run counter to Congress's accommodation in § 8(f) to the necessity in the industry of entering long term agreements applying to employees not yet hired for jobs not yet in existence. S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. 424.

Even if general subcontracting agreements are permitted to be negotiated wholesale and then are triggered only when union workers appear on the job, the enforcement problems remain severe. The transitory nature of employment at each jobsite, as well as the difficulty of defining the applicable time span during which jobsite conflict is threatened, present substantial problems.[38] If a rule is adopted that the appearance of any union worker on the job triggers subcontracting agreements covering the entire project, it presents an especially strong incentive for anti-union discrimination by employers.

We are presented, then, with a number of practical and theoretical considerations supporting our decision that the present subcontracting agreements, arrived at in the context of collective bargaining relationships, are within the proviso of § 8(e). First, there are overwhelming practical difficulties in confining the subcontractor agreements to jobsites where actual union-nonunion or interunion conflict occurs among workers. Second, the legislative history as well as the actual conditions existing in the construction industry militate in favor of broad subcontractor clauses in collective bargaining

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[38]The dissent makes the point that even under our decision, unions must police jobsites to ensure compliance with subcontractor clauses. We believe that it is a more manageable task, however, to police jobsites to ensure that subcontractors working there have agreements with the policing union than it is to determine whether any union worker has been working on the jobsite at any time, or perhaps at any time when that worker's presence might lead to jobsite friction.

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agreements. Third, the *Connell* decision, which admittedly has language that might point to either result, may fairly be read to support the validity of subcontracting clauses when there is a collective bargaining relationship, regardless of the presence or absence of union workers at the jobsite.

Given these considerations, we reject a narrow interpretation of the proviso which will substantially change the existing practice in the industry. In addition, we believe that due regard should be given to the view of the National Labor Relations Board supporting these agreements.[39] It is true that the position of the agency has not been an unwavering one,[40] but the Board's articulation of current labor policy is undoubtedly entitled to weight in our decision.

VI.
ADDITIONAL ISSUES.

It is contended by AGC that even if the construction industry proviso authorizes clauses requiring subcontractors to have agreements with unions in general, it does not permit clauses to require a collective bargaining agreement with a particular union. We note, however, that nothing in the language of the § 8(e) proviso suggests such a limitation, even though "particular-union" clauses were a part of industry practice at the time of its enactment. Two months prior to the creation of the proviso, the District of Columbia Circuit upheld a "particular-union" subcontractor agreement in a decision that was submitted to the House com-

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[39] *NLRB v Yeshiva University*, 444 U.S. 672, 691 (1980). *Compare Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978), *and NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350-51 (1978), *with NLRB v. International Longshoremen's Association*, 100 S. Ct. 2305 (1980).

[40] *See International Union of Operating Engineers, Locals 542, 542-A and 542-B, (York County Bridge, Inc.)* 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); General Counsel Memorandum, note 25, *supra*.

mittee considering the 1959 amendments. *Operating Engineers Local Union No. 3 v. NLRB, supra;* 2 House Hearings 803-07. In the light of this history, we do not feel free to find in the proviso a limitation not written there by Congress. We are joined in this conclusion by the District of Columbia Circuit in *Donald Shriver, Inc. v. NLRB, supra,* slip op. at 52-5. We also note that prohibition of "particular-union" subcontractor clauses would defeat at least some of the interests that we earlier found to be served by the construction industry proviso. One such interest is that of a union in protecting the wages and benefits of its members in the primary bargaining unit who may later work for subcontractors. That concern is shared by no other union, and is best served by a "particular-union" clause.

It is next contended, this time by Woelke, that even if a subcontractor agreement is protected by the construction industry proviso, it is an unfair labor practice for a union to picket or strike in order to induce a contractor to enter such an agreement. The legislative history of the 1959 amendments is in conflict on this point.[41] The actual wording of § 8(b)(4)(ii)(A), however, prohibits coercion of any person "*to enter into any agreement which is prohibited by* [§ 8(e)]."[42] The negative implication of this provision is

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[41]Representative Barden, the Leader of the House conferees, referred to the proviso as permitting "voluntary agreements." 105 Cong. Rec. 18128; II Leg. Hist. 1715.

Senator Kennedy, the leader of the Senate conferees, appeared to be of the view that economic coercion was permissible, and stated that the proviso was not intended to change the law "with respect to the legality of a strike to obtain such a contract." 105 Cong. Rec. 17900, II Leg. Hist. 1433.

Senator Goldwater, one of the Senate conferees, and the man who may have been most responsible for the Landrum-Griffin Amendments, *see* 105 Cong. Rec. 15516, II Leg. Hist. 1552 (statement of Rep. Madden), said that the question was left open for the courts to decide. 105 Cong. Rec. 19772, II Leg. Hist. 1858.

[42](Emphasis supplied). Section 8(b)(4)(ii)(A) appears *supra* note 4.

surely that picketing or striking to induce entry into an agreement protected by the proviso to § 8(e) is lawful.

After the 1959 amendments, the Board originally took the position that such agreements had to be voluntarily entered, but its position was uniformly rejected by this and other courts of appeals. *Construction Production & Maintenance Laborers Union, Local 383 v. NLRB, (Colson & Stevens Construction Co.)* 323 F.2d 422 (9th Cir. 1963); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964). The Board subsequently acquiesced in the courts' view. *Northeastern Indiana Building & Construction Council*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965). We see no reason to disturb the present law and to read into the Act a limitation that runs counter to the suggestion of its plain words. Nor do we accept the contention that picketing or striking to obtain a subcontractor agreement violates the § 7 rights of employees of subcontractors; they are no more affected by a subcontractor agreement achieved by picketing than by one voluntarily entered.

The final issue concerns the effect of the provision in the AGC contract that permits each party to resort to self-help when the other party does not comply with an arbitration decision made pursuant to the grievance procedure.[43] The Board concluded that these provisions authorized picketing or strikes to enforce the subcontractor agreement, and held that the contract was consequently unlawful. The rule that picketing or strikes may not be used to enforce subcontractor agreements arises from the fact that the 1959 amendments

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[43] *See* note 1, *supra*.

exempted the construction industry from § 8(e)'s prohibition against secondary boycott agreements, but did not exempt it from § 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. The legislative history makes clear Congress's intent that subcontractor clauses entered pursuant to § 8(e) were to be enforced judicially rather than by self-help,[44] and this court has followed that view. *NLRB v. International Brotherhood of Electrical Workers*, 405 F.2d 159, 163-64 *9th Cir. 1968, cert. denied*, 395 U.S. 921 (1969). We have also held that such clauses may be enforced by arbitration. *La Mirada Trucking, Inc. v. Teamsters Local Union 166*, 538 F.2d 286 (9th Cir. 1976).

Engineers argue, without pressing the point strongly, that self-help to enforce an arbitration award that in turn enforces a subcontractor agreement is not unlawful. The picketing or strike, according to the Union, is simply enforcing the arbitration award and not the underlying agreement. We believe that acceptance of this contention would too easily circumvent the clear intent of Congress and would do violence to the plain words of § 8(b)(4)(ii)(B). Nor can we accept the suggestion of the Union that the AGC agreement must be construed to limit the self-help clause to self-help which is determined to be lawful. We must take the agree-

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[44]The Conference Committee, after stating that it did not intend the proviso to change existing law regarding subcontractor agreements, stated: "Picketing to enforce such contracts would be illegal under the *Sand Door* case *Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39, I Leg. Hist. 943. *See also*, 105 Cong. Rec. 17900, II Leg. Hist. 1433 (remarks of Sen. Kennedy). Senator Goldwater subsequently explained the proviso as follows: "The union may go into a court and sue [the contractor] if he fails to live up to that agreement. But they cannot strike or picket him to make him live up to it. . . ." 105 Cong. Rec. A8359, II Leg. Hist. 1830.

ment to mean what it says. *Operating Engineers, Local No. 701 v. NLRB*, 578 F.2d 841, 842 (9th Cir. 1978); *Donald Schriver, Inc. v. NLRB, supra*, slip op. at 57-58.

VII.
CONCLUSION.

We find that provisions in a collective bargaining agreement forbidding the signatory employer to subcontract work at a construction site to firms that do not have a contract with the signatory union are within § 8(e) of the National Labor Relations Act, but are protected by the construction industry proviso to that section. They need not be limited to jobsites presenting the possibility of conflict between union and nonunion workers. We also find that unions may picket or strike to induce employers to enter such agreements but that, once entered, the agreement may not be enforced by self-help. Clauses authorizing self-help enforcement, directly or through arbitration decisions, are consequently invalid. We accordingly enforce the orders of the Board in their entirety.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v. NLRB, et al. - Nos. 78-3469, 78-3487, 78-3619, 78-3468, 79-7011

SNEED, Circuit Judge,(with whom CHOY, ANDERSON and FARRIS, Circuit Judges, concur) dissenting:

As with many legal issues, where one ends up in this case depends upon were one starts. While I have no disagreement with the court's holding that union signatory clauses are secondary and within the scope of section 8(e), I respectfully dissent from its holding that such clauses are invariably within the construction industry proviso to section 8(e) when a collective bargaining relationship exists between the employer and the union seeking the clause. The majority reaches its conclusion by commencing with the view that the construction industry presents unique problems in labor relations that require the legitimation of union signatory clauses. Although admitting that the legislative history is not compelling, the court finds that legitimation was provided by the construction industry proviso. My starting point, on the other hand, is with *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), and its concern with the "top-down organizing" effect of union signatory clauses. This concern led the panel before which this case was heard originally to hold as follows:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB*, 609 F.2d 1341, 1347 (9th Cir. 1979).

I would adhere to that holding and to the reasons given by the panel therefor. *Id.* at 1348-50.

The court rejects the panel's result because it is said to represent an "even narrower" view of the construction industry proviso than that adopted by the Supreme Court in *Connell*. .... F.2d .... (p. 26 majority opinion). Alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site," 421 U.S. at 630, is said not to have been a concern of the Supreme Court in *Connell* because in that case "the union did not purport to represent *any* of the interests served by the proviso." .... F.2d .... (p. 26). Presumably this is because there was no collective bargaining agreement between the employer and union in that case.

As I see it, the crucial language in *Connell* is as follows:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." 421 U.S. at 635.

This language, as the majority acknowledges, is not entirely unambiguous. It is, however, not inconsistent with the panel's holding as set out above; and, more importantly, that holding is more empathetic with *Connell*'s concern with the "top-down" organizing effect of union signatory clauses than is that of the majority.

It is true, as the majority states, that any union signatory clause has some "top-down" organizing effect. The difference between the panel's holding and that of the en banc

court lies in the scope of this effect. The en banc court permits a clause that forbids subcontracting work covered by the collective bargaining agreement to any firm not having a contract with the signatory union. It matters not whether any of the employees of the signatory employer, who are members of the signatory union, are employed on the jobsite. It matters not that, in the absence of the union signatory clause, the work could have been subcontracted to a firm which, even though adhering to union standards governing wages and working conditions, was more efficient than its competitors.

It must be acknowledged that the panel's holding would not greatly diminish the "top-down" organizing effect of the union signatory clause. It would permit the choice of the more efficient firm only when to do so would entail no jobsite friction between members of the signatory union and workers performing work covered by the collective bargaining agreement. Thus, a provision in the agreement precluding subcontracting of all the covered work would prevent choice of the more efficient firm and thus provide a substantial "top-down" organizing effect. A clause prohibiting subcontracting is permissible. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 644-46 (1967); *see also Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Johnson*, 368 F.2d 549 (9th Cir. 1966). However, the panel's holding would afford an opportunity by which an employer could accept a union signatory clause without sacrificing all right to choose the more efficient subcontractor. Preservation of this opportunity would be more consistent with the primary concern of *Connell* than is the position of the en banc court. I doubt that the en banc court seriously contends otherwise. It does believe that the preservation of this opportunity would provide a "strong incentive for anti-union discrim-

ination by employers." .... F.2d .... (p. 29). I am dubious. Under either view an anti-union employer will strive to avoid a union signatory clause. That an employer under the panel's view would have a limited opportunity to subcontract to a firm not having an agreement with the signatory union is not likely to make it more anti-union.

I agree with the en banc court that the legislative history of the construction industry proviso is not conclusive. We have previously considered the legistlative history of the proviso. *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975). In surveying the legislative history, we conclude that the dominant motive of Congress in adopting the proviso was to permit agreements that aimed at eliminating jobsite friction between union and nonunion workers. *Id.* at 851; *accord, Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966); *Essex County District Council of Carpenters v. NLRB*, 332 F.2d 636, 640 (3d Cir. 1964). And the National Labor Relations Board previously believed: "[T]he 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite." *International Union of Operating Engineers, Locals 542, 542-A and 542-B*, 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977). I see no reason to depart from our earlier analysis of the purpose of the proviso.

Admittedly, Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases. Others argued that the proviso was intended to permit agreements not to use prefabricated pipe unless union workers did the fabricating. 105 Cong. Rec. 19785-86, 19809 (1959); II Leg. Hist. 1815-16 (extension of remarks of Senator McNamara and Representative Thompson); *contra* 105 Cong. Rec. 20004-05 (1959); II Leg. Hist. 1861 (extension remarks of Rep-

resentative Kearns). But neither of these purposes were clearly understood as the reason for the proviso. As *Connell* and *ACCO* concluded, the legislative history supports the conclusion that most congressman thought the proviso was intended to address the problem of jobsite friction. *See, e.g.*, I Leg. Hist. 82 (message from President Eisenhower to Congress); 105 Cong. Rec. 15852, II Leg. Hist 1684 (statement of Congressman Goodell); 105 Cong. Rec. 17333-34, II Leg. Hist. 1383-84 (proposed instructions for Senate conferees). Also, as I read the excerpt from the memorandum by Representatives Thompson and Udall quoted by the en banc court, it too strongly supports the conclusion that the proviso was aimed at the jobsite friction problem. The references to employees working "side by side" on a "single building" so indicate. 105 Cong. Rec. 15541 (1959); II Leg. Hist. 1577.

The en banc court notes that some subcontractor clauses similar to those challenged in these cases existed in 1959. Since they conclude that the Congress intended to preserve the law relating to the construction industry as it then existed, the court argues that Congress intended that the proviso would protect broad subcontractor clauses. I believe this reasoning gives far too much weight to the bare reference to the pattern of collective bargaining referred to in the Committee Report. *See Connell, supra*, 421 U.S. at 628-29. Furthermore, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959. And the proviso clearly changed the law by explicitly limiting its protection to jobsite work. That limitation at least partially overruled the *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958). Thus the most that can be said is that Congress intended to preserve the existing law within the scope of the proviso. That proposition, however, begs rather

than answers the question of what the proper scope of the proviso is. That is what this case is about. Our decision, whatever it is, can draw but little comfort from the legislative history.

The majority also argues that practical considerations favor the result they reach. But the practical problems of following the panel's decision would not have been severe. If broad subcontractor clauses are approved, unions must still police construction sites to ensure compliance. No more is required by a rule limiting subcontractor clauses to jobsites at which members of the signatory union are employed. The serious practical problems raised by the majority would arise only if subcontractor clauses were required to be renegotiated on a jobsite by jobsite basis, but that would not be required by the panel's interpretation of the proviso.

Thus, we come to the nub of the matter. Which interpretation of the proviso is more faithful to curbing "top-down" organizing, which, it must be remembered, was Congress's objective in adopting the 1959 Act which included section 8(e). *Connell, supra,* 421 U.S. at 632-33. The holding of the panel gets my nod.[1]

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[1]Because the panel concluded that the broad subcontractor clause in the AGC agreement violated section 8(e), it did not address the lawfulness of the agreement's self-help enforcement provision. 609 F.2d at 1351. I agree with the majority of this en banc court that the self-help enforcement provision must be interpreted to mean what it says and that Congress clearly intended that subcontractor clauses were to be enforced judicially rather than by strikes or picketing. Therefore, I agree that the self-help clause in the AGC contract is invalid.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v. NLRB, et al. — Nos. 78-3469, 78-3619, 78-3468, 79-7011.

FARRIS, Circuit Judge, with whom Judge Choy and Judge Anderson join, dissenting:

I join Judge Sneed's dissent in all respects and add some comments regarding the scope of the construction industry proviso.

The collective bargaining agreements here prohibit signatory general contractors from subcontracting any work covered by the agreement at any construction site to non-signatory contractors. These agreements violate subsection 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), unless they are permitted under the construction industry proviso, which allows "agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . . ." *Id.* The precise issue here is whether that proviso legalizes agreements that limit subcontracting at sites where the employer has no employees represented by the union. The majority holds that it does. I disagree.

In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), the Supreme Court concluded that the construction industry proviso did not authorize a construction industry employer and a union not representing its employees to agree to limit the employer's right to subcontract. Finding no congressional purpose in extending the proviso to legalize agreements between employers and "stranger" unions, the Court narrowly construed the proviso to limit its scope "to agreements in the context of collective-bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well." *Id.* at 633.

Here, the three judge panel concluded that the proviso was designed to deal with the special problem of jobsite friction in the construction industry. It read the proviso to allow a collective bargaining agreement to restrict an employer's subcontracting at the jobsite where it employs the union's members. The majority asserts that another purpose—maintenance of contract standards in the industry—requires that the proviso be read to allow restrictions on the use of nonsignatory subcontractors at any jobsite. *See also Donald Shriver, Inc. v. NLRB*, No. 78-2177, slip op. at 43-47 & n.29 (D.C. Cir. Oct. 20, 1980). I agree that a congressional purpose in addition to reduction of jobsite friction may require a broader scope for the proviso, but I do not agree that maintenance of contract standards in the industry is such a purpose. The Court in *Connell* read the proviso to allow restraints in the context of collective bargaining relationships. That does not mean that when a relationship exists *any* restraint can be imposed; rather, the relationship only has a bearing on the legality of the restraint when the relationship and the restraint are related. It is not sufficient that the restraint serves the interest of workers in the industry generally. It must serve the interests of the workers represented by the union in the course of their employment by the employer.

The only way the all-jobsite restraints here can serve the interests of these workers is by preventing loss of work due to subcontracting. This problem, however, is resolved by a common, *primary* restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here. In my view the construction industry proviso is not concerned with maintenance of contract standards. *See generally* Archibald Cox, Derek Bok & Robert

Gorman, *Cases and Materials on Labor Law* 892-95 (8th ed. 1977) (while garment industry proviso was concerned with maintenance of industry standards, construction industry proviso was concerned with jobsite friction). The proviso should not be read to permit restraints which extend to jobsites where no unit employees are present and which are therefore unrelated to reduction of jobsite friction.

APPENDIX B.

Opinion.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner, v. National Labor Relations Board, Respondent.

Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., Petitioner, v. National Labor Relations Board, Respondent.

International Union of Operating Engineers, Local No. 701, Petitioner, v. National Labor Relations Board, Respondent.

Woelke & Romero Framing, Inc., Petitioner, v. National Labor Relations Board, Respondent, and Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Intervenors.

National Labor Relations Board, Petitioner, v. Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Respondents. Nos. 78-3469, 78-3487, 78-3619, 78-3468 and 79-7011.

United States Court of Appeals, Ninth Circuit. Dec. 26, 1979.

On Petition for Review of the Order of the National Labor Relations Board.

Before SNEED and KENNEDY, Circuit Judges, and EAST* District Judge.

SNEED, Circuit Judge:

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Construction contractors challenge in these cases the legality of a provision in a collective bargaining agreement which prohibits a signatory contractor from assigning work to subcontractors unless the subcontractors have a collective bargaining agreement with the signatory union. The National Labor Relations Board has ruled that such a provision does not violate the prohibition in the National Labor Relations Act (the Act) against "hot cargo" agreements[1].

In deciding these cases we must determine the scope of the Supreme Court's holding in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). We hold that under *Connell* the clauses before us are not lawful under section 8(e) of the Act, 29 U.S.C. § 158(e) (1976), and are not within the construction industry proviso of section 8(e).

Our jurisdiction rests on 29 U.S.C. § 160(e) and (f) (1976).

I.
FACTUAL BACKGROUND

Two decisions of the Board are before us for review. The first considered the legality of a collective bargaining agreement between the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC), which is an association of approximately 200 employers engaged in construction in Oregon and southwest Washington, and the International Union of Operating Engineers, Local 701 (Engineers). The agreement, effective from June 1, 1975 through May 31, 1980, contains a provision precluding

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[1]A hot cargo provision, so named because of the prevalence at one time of such provisions in Teamsters Union contracts, is an agreement between a union and an employer by which the employer promises not to use the materials—or, as in this case, the services—of nonunion employers.

AGC employers from assigning jobsite work covered by the agreement to any subcontractor which does not have a current labor agreement with Engineers.[2] Another provision makes violations of the agreement subject to a grievance and arbitration procedure, and the results of arbitration are enforceable by "such action as they [the parties] deem necessary . . ." This article would thus permit enforcement of the agreement, including the subcontractor clause, through strikes or picketing.

Following a charge filed by another association of construction employers, the General Counsel of the NLRB issued a complaint alleging that the agreement's subcontractor clause and enforcement provision violate section 8(e) of the Act.[3] The case was heard by the Board upon stipulated facts and it held that, while the subcontractor clause fell within the general proscription of section 8(e), the clause was protected by the section's construction industry proviso. However, the Board invalidated the self-help enforcement

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[2]The subcontractor clause provides in pertinent part as follows:

> Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

[3]Section 8(e) provides in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

29 U.S.C. § 158(e) (1976).

provision insofar as it authorized economic sanctions in support of the subcontractor clause. All parties petitioned this court for review and modification of the Board's order. The Board, of course, seeks enforcement of its order.

The second decision of the Board which we review considered challenges to a proposed collective bargaining agreement which locals of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), sought to establish with Woelke & Romero Framing, Inc. (Woelke), a framing subcontractor who has performed work for various construction contractors in southern California. Between 1974 and 1977, Woelke was a party to a collective bargaining agreement with Carpenters. This agreement was due to expire on June 15, 1977, and, beginning on June 3, 1977, Woelke commenced negotiations with Carpenters concerning a successor arrangement. Two provisions of the proposed new agreement generated contention. One of these provisions forbade Woelke to subcontract jobsite work except with firms having a current labor agreement with Carpenters.[4] The second provision included foremen within the

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[4]The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

The proposed agreement also contains an alternative subcontractor clause, applicable in the event that the principal clause should be invalidated, which would prevent subcontracting with any firm unless the firm's employees belong to a union and unless the subcontractor agrees to comply with the full terms of the labor agreement between Woelke and Carpenters. We accept the Board's conclusion that the alternative provision is merely a disguised union signatory clause, since in practice only a subcontractor affiliated with Carpenters could satisfy its requirements, some of which are unrelated to any legitimate primary interest of the bargaining employees.

unit of employees whom Carpenters would represent. According to the parties' stipulations, foremen function as supervisors and also as Woelke's selected representatives for purposes of collective bargaining or the adjustment of grievances. Impasse over these provisions led to the termination of negotiations on August 4, 1977. Thereafter, Carpenters picketed Woelke at four jobsites. As a consequence of this picketing, employees of the subcontractors of general contractors at two of the jobsites refused to work.

Upon charges filed by Woelke, the General Counsel of the NRLB issued a complaint against Carpenters. After hearing the case upon stipulated facts, the Board decided that the proposed subcontractor clause was protected by the construction industry proviso. It follows, the Board held, that picketing by Carpenters did not violate the probibition in section 8(b)(4)(i) and (ii)(A) of the Act, 29 U.S.C. § 158(b)(4)(i) and (ii)(A) (1976).[5] Before reaching this conclusion the Board held that but for the construction industry proviso the proposed subcontractor clauses would violate section 8(e).

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[5]Section 8(b)(4)(i) and (ii)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> * * * * * *
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); . . .

29 U.S.C. § 158(b)(4)(i) and (ii)(A) (1976).

In addition, the Board concluded that bargaining to impasse and picketing intended to compel the unionization of Woelke foremen constituted a violation of section 8(b)(1)(B) of the Act, 29 U.S.C. § 158(b)(1)(B) (1976),[6] and ordered Carpenters to desist from this practice.

The Board requests enforcement of this order. Woelke seeks reversal of the Board's decision with respect to the subcontractor clause.

We shall discuss first the critical issue of these cases, *viz.* the scope of the construction industry proviso as applied to the subcontractor clauses involved in each case. Thereafter the remaining issues pertinent to each case will be addressed.

II.
SCOPE OF THE CONSTRUCTION INDUSTRY PROVISO.

Our analysis will proceed as did that of the Board. That is, we shall initially determine whether these clauses fall within the general proscription of section 8(e) and, inasmuch as we agree with the Board's conclusions that section 8(e) does proscribe these clauses, we shall then determine whether the clauses are, nonetheless, protected by the construction industry proviso. As already indicated, our conclusion with respect to the scope of the proviso differs from that of the Board.

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[6]Section 8(b)(1)(B) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . .

29 U.S.C. § 158(b)(1)(B) (1976).

A. *Does Section 8(e) Proscribe These Clauses?*

The subcontractor clauses in these cases require that the employer not do business with another employer unless that employer has a labor agreement with the signatory union. Reading section 8(e) literally there is no doubt but that section 8(e) proscribes such clauses. The problem is not that simple, however. In *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967), the Supreme Court read into section 8(e) a distinction between primary and secondary objectives. An agreement which advances only primary objectives of the bargaining employees, such as preserving work opportunities, is not unlawful. Thus, a court must consider:

> . . . whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. Were the latter the case [the contracting employer] . . . would be a neutral bystander, and the agreement . . . would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.

Id. at 644-45, 87 S.Ct. at 1268, 1269 (citations omitted).

Applying this standard, this court has recognized that a union signatory clause—as opposed to a union or area standards clause, which merely requires that the employees of subcontractors work under the same terms and conditions

as those enjoyed by union members—is normally secondary in nature. *Griffith Co. v. NLRB*, 545 F.2d 1194, 1199 (9th Cir. 1976), *cert. denied*, 434 U.S. 854, 98 S.Ct. 171, 54 L.Ed.2d 125 (1977). As the Second Circuit observed in *NLRB v. National Maritime Union*, 486 F.2d 907, 913 (2d Cir. 1973), *cert. denied*, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974): "If the clause is a union signatory clause, the union has an interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units."

Nor can these clauses be regarded as valid work preservation provisions. They do not assure work opportunities for employees in the respective work units, i.e., employees of AGC or of Woelke; rather, they operate for the general benefit of the respective unions. Hence, neither provision is directed to "the labor relations of the contracting employer *vis-a-vis* his own employees." *National Woodwork Manufacturers*, 386 U.S. at 645, 87 S.Ct. at 1268, 1269. We agree with the Board, therefore, that the subcontractor clauses fall within the general prohibition of section 8(e).

B. *Does the Construction Industry Proviso Authorize These Clauses?*

1. *The Interpretation Required by Connell Construction Co.*

In determining whether these subcontractor clauses are protected by the construction industry proviso, we encounter the Supreme Court's decision in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). There the union, as a result of picketing, had obtained a subcontractor agreement with a general building contractor even though the union did not represent or seek to represent the contractor's own employees. When the contractor challenged the agreement under the Sherman Act, the union defended, in part, by arguing that the agree-

ment was expressly authorized by the construction industry proviso. Declaring that "[section] 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment," *id.* at 628, 95 S.Ct. at 1838, the Supreme Court observed that the section was part of a program enacted to limit "top-down" organizing campaigns. The construction industry proviso, though an exception to the section's general proscription, should be construed so as not to undermine that objective. *Id.* at 628-33, 95 S.Ct. 1830. The Court concluded that the subcontractor clause in that case was not covered by the proviso. It expressed its holding in the following manner:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."

Id. at 635, 95 S.Ct. at 1841.

The Board in the cases here being reviewed emphasized heavily the Supreme Court's reliance on the absence of a collective bargaining relationship. Where this relationship exists it held union signatory clauses were within the construction industry proviso. The Board stated:

> "The bottom line of the Court's opinion, as we construe it, is that the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective bargaining relationship, and possibly without such a relationship if the clauses are aimed at avoiding the Denver Building Trades [*NLRB v. Denver Building Trades*, 341 U.S.

675 [71 S.Ct. 943, 95 L.Ed. 1284] (1951)] problems."[7]

We disagree. We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor. It follows that under our holding a general contractor, who does not use at any time on a particular jobsite his employees who are members of the signatory union, and does not engage subcontractors whose employees are members of the signatory union, can engage nonunion subcontractors to perform work on that particular jobsite that otherwise would be done by members of the signatory union. To do so would not, in our opinion, violate a valid union signatory clause. To hold otherwise extends the construction industry proviso beyond the limits we attribute to *Connell*.

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[7]The unions and the Board purport to find support for this interpretation of *Connell* in *California Dump Truck Owners Ass'n v. Associated General Contractors of America*, 562 F.2d 607 (9th Cir. 1977). Declining to find challenged provisions of a labor agreement unlawful under the antitrust statutes, this court in *Dump Truck* distinguished *Connell* with the observation that in *Connell* no collective bargaining relationship had existed. *Id.* at 613. However, *Dump Truck* did not involve interpretation of section 8(e), and its quotation from *Connell* was taken from a section of the *Connell* opinion which was not concerned with section 8(e). Moreover, the provision challenged in *Dump Truck* was not a union signatory clause; the provision did not prohibit employers from using nonunion subcontractors but merely required that such subcontractors receive a rate of pay not less than that of union employees, and that the union be notified when a nonunion subcontractor was employed. *Id.*

We are not aware, moreover, of any decision of any other court of appeals which has read *Connell* as construing the construction industry proviso so as to protect all subcontractor agreements made in a collective bargaining context. The district courts which have considered the question have reached contrary conclusions. *Compare, e.g., Long v. Floorcraft Carpet Co.*, 82 Labor Cases ¶ 10,044, p. 16,151 (D.Ore.1977), *with In re Bullard Contracting Corp.*, 464 F.Supp. 312 (W.D.N.Y.1979).

Our holding recognizes the validity of a provision in a collective bargaining agreement that with respect to any particular jobsite will preclude the possibility of members of the signatory union being required to share work with nonunion workers. Under a provision of this sort the employment of one member of the signatory union on the jobsite assures that all relevant work on that jobsite will be done by signatory union members. We believe this is a more accurate reading of *Connell's* holding than that of the Board.

We acknowledge that the teaching of *Connell*, as applied to the issue we are considering, is not unambiguous. The Court stated that the construction industry proviso applies only to work performed at the jobsite and then added, quoting *Drivers Local 695 v. NLRB*, 124 U.S.App.D.C. 93, 99, 361 F.2d 547, 553 (D.C.Cir.1966), that some courts had assigned the proviso the "even narrower function" of alleviating " 'the frictions that may arise when union men work continuously alongside nonunion men on the same construction site.' " *Connell*, 421 U.S. at 630, 95 S.Ct. at 1839. The Court's statement left open this "even narrower" view of the proviso's scope. However, since the subcontractor agreement in *Connell* occurred outside the collective bargaining context altogether, the Court was not required to decide whether and under what circumstances a subcontractor clause contained in a valid labor agreement would receive the protection of the proviso. What *Connell* left unanswered we must confront and answer.

2. *Reasons In Support of Our Holding.*

We believe our response is supported by the proviso's background and statutory setting. Section 8(e) was enacted as part of the Labor-Management Reporting and Disclosure Act of 1959. The section was designed, as the Supreme Court noted in *Connell*, to strengthen the prohibition in

section 8(b)(4) against secondary activities by forbidding agreements which might be used to circumvent that section's ban on the use of economic coercion for secondary objectives. *Id.* at 628, 95 S.Ct. 1830. However, the prohibition in section 8(e) against hot cargo agreements was made subject to two exceptions: a broad exemption for the garment industry, and the more limited exception for the construction industry.

The unions and the Board contend that, at least with respect to agreements made within the context of collective bargaining, the proviso should be given the expansive scope which its literal terms suggest. Their argument can be stated syllogistically: At the time the proviso was enacted, the union signatory subcontractor provisions were lawful. The proviso was intended to preserve in the construction industry the law as it then existed. Hence, the proviso was intended, and should be construed, to protect subcontractor provisions.

The difficulty with this argument is that neither of the premises can be accepted without qualification. In 1959, when section 8(e) was enacted, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined. *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed.2d 1186 (1958), the so-called *Sand Door* case which in the unions' view defined the state of the law at that time, involved an agreement forbidding the use of nonunion material, not a subcontractor provision. Moreover, the issue in *Sand Door* was whether union picketing and coercion designed to enforce a hot cargo provision was unlawful under section 8(b)(4), and the Court, although it indicated that a hot cargo clause was not *prima facie* evidence of illegal coercion under section 8(b)(4), *id.* at 108, expressly declined to consider "the invalidity of hot cargo provisions

as such." *Id.* at 107, 78 S.Ct. at 1020. Thus, the lawfulness of union signatory clauses such as those challenged here was not determined in *Sand Door*.

Furthermore, even if subcontractor clauses were lawful prior to the passage of the Labor-Management Reporting and Disclosure Act, it is unclear to what extent the construction industry proviso was intended to preserve the then current law. The unions rely upon statements made by Senator Kennedy and an extract from the Conference Report which suggest that the proviso would not change the law of the *Sand Door* decision. Yet in explicitly limiting the proviso's protection to jobsite work, Congress adopted a restriction which was never mentioned in *Sand Door*. Indeed, in the same paragraph which indicates that the law of *Sand Door* would be preserved, the Conference Report states that the proviso would not protect "agreements relating to supplies or other products or materials . . . delivered on the site of the construction," which was precisely the kind of agreement at issue, and allegedly declared to be lawful, in *Sand Door* H.R.Rep.No. 1147, 86th Cong., 1st Sess. 39, U.S.Code Cong. & Admin.News 1959, pp. 2318, 2511, *reprinted in* I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 943 (1959). Hence, the broad assertion that the construction industry proviso was designed to leave the law unchanged is inaccurate. Congress may have intended to preserve existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is.

We must, therefore, look to the purpose Congress sought to serve by enacting an exception for the construction industry. In *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975), this court surveyed the legislative history of section 8(e) and concluded:

> Although the legislative history of the proviso is oftentimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, "the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside nonunion men on the same construction site." *Drivers, Salesmen, Etc., Local 695 v. NLRB*, 124 U.S.App.D.C. 93, 361 F.2d 547, 533 (1966) (emphasis added). What appears critical is that the potential for conflict is likely to arise only when the nonunion laborers are in frequent and relatively close contact with the union craftsmen.

The court's conclusion in *ACCO* is consistent with the Supreme Court's reasoning in *Connell*. *Connell* noted that the construction industry proviso resulted from efforts to overrule the holding of *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951), in which the Supreme Court had ruled that union picketing which was intended to force a general construction contractor to terminate its contract with a nonunion subcontractor violated section 8(b)(4). *Connell*, 421 U.S. at 629, 95 S.Ct. 1830. The *Denver Building Trades* decision was objectionable because, as Justice Douglas had argued in dissent, "[a]ll the union asked was that union men not be compelled to work *alongside nonunion men on the same job*." *Denver Building Trades*, 341 U.S. at 692, 71 S.Ct. at 953 (emphasis added). Thus, the purpose of the proviso was to permit unions and construction employers to avoid the tension and discontent that exists when members of a

union are required to work on the same jobsite with nonunion workers of the same craft or trade.[8] Our holding permits the avoidance of precisely that source of tension and discontent.

We cannot extend the proviso's protection beyond the purpose for which the exemption was created without creating a shield of immunity for agreements which we believe Congress wished to prohibit. Hence, the purpose of the exception dictates its scope. A subcontractor clause is a contract with a particular union which flatly forbids the use of subcontractors who have no contract with the signatory union on jobsites, regardless of whether workers of the signatory union will also be employed on those sites, goes well beyond the kind of arrangement which the proviso was created to protect. If a general contractor assigns work on a construction site only to nonunion subcontractors, the problem of jobsite friction between union and nonunion employees of a particular craft or trade does not arise. Indeed, a general contractor that assigns no employees who are members of the signatory union to a particular construc-

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[8]The employer petitioners argue further that the proviso was not intended to protect *particular union* clauses, i.e., agreements which require that an employer's subcontractors belong not merely to a union, but to the union which is party to the labor agreement containing the subcontractor proviso. This interpretation is based upon several statements by Senators indicating that the proviso would protect agreements precluding the use of "nonunion" (or, in a single instance, "unorganized") subcontractors. The employer petitioners interpret the term "nonunion" to refer only to firms not belonging to any union, and then make the negative inference that the proviso does not protect subcontractor clauses forbidding the use of firms which, though not associated with the signatory union, are not "nonunion" firms in this narrow sense. This inference is dubious at best and, in any event, the fragments of legislative history upon which these parties rely do not constitute conclusive evidence of the understanding of Congress as a whole. Moreover, this view of the exception would frustrate the purpose of the proviso, because jobsite friction might arise between members of competing unions as well as between union and nonunion workers. We therefore decline to take this restrictive view of the proviso's scope.

tion project occupies the same position, with respect to that project and the signatory union, as the contractor in *Connell* which had no union employees at all. The fact that a contractor may employ signatory union personnel elsewhere is, for purposes of the proviso, irrelevant.

We find additional support for our interpretation of the construction industry exception in the proviso's statutory setting. Section 7 of the Act, 29 U.S.C. § 157, provides, with limited exceptions, that employees have the right to refrain from any or all union activities. In addition, if employees choose to unionize, they have the right to bargain "through representatives of their own choosing . . ." Although section 8(f) of the Act, 29 U.S.C. § 158(f), permits "pre-hire" labor agreements in the construction industry, that section does not override the workers' rights of self-determination. *Connell*, 421 U.S. at 632, 95 S.Ct. 1830. A union signatory subcontractor clause operates to force nonunion firms and their employees to submit to union representation in order to be eligible for subcontracting opportunities, thus undermining the rights established in section 7. The agreement between AGC and Engineers, for instance, forecloses to nonunion firms employment opportunities with any of 200 construction contractors throughout Oregon and southwest Washington. The potential coercive effect of such a provision is manifest. The clause is thus precisely the kind of instrument for "top-down" organizing which the Supreme Court condemned in *Connell*. *Id.* at 631, 632, 95 S.Ct. 1830. For those reasons, we believe that the position taken by the Board, which legitimates the use of such an organizing weapon by a union as long as the union has a collective bargaining relationship with the signatory employer, is improper.

III.
REMAINING ISSUES.

Having decided the principal issue raised by these cases, we now consider the proper disposition of each of the cases before us.

For the reasons elaborated in the preceding section, the subcontractor clause contained in the collective bargaining agreement between AGC and Engineers constitutes a violation of section 8(e). The clause in its present form, as section 8(e) provides, is unenforceable. Hence, we need not decide whether the agreement's self-help enforcement provision as applied to a lawful subcontractor clause would violate section 8(e).

The subcontractor provision proposed by Carpenters in negotiations with Woelke is also unlawful under section 8(e). Picketing engaged in by Carpenters in order to compel Woelke to accept the provision was thus a violation of section 8(b)(4)(i) and (ii)(A), and should have been enjoined by the Board. The Board's order is accordingly modified to enjoin Carpenters from picketing or using economic coercion for the purpose of inducing Woelke to enter into any agreement which contains such a provision. Our disposition of this issue makes it unnecessary to consider Woelke's additional contention that picketing intended to compel acceptance even of a lawful subcontractor clause is prohibited by section 8(b)(4)(i) and (ii)(A).

The Board requests enforcement of its order enjoining the use by Carpenters of picketing, strikes, or other coercion in order to compel Woelke to include within the bargaining unit foreman who are supervisors or Woelke's representatives for purposes of collective bargaining or the adjustment of grievances. Carpenters has not contested the Board's ruling that picketing or coercion used for this purpose con-

stitutes a violation of section 8(b)(1)(B) of the Act. The Board's order with respect to this issue should be enforced.

The Board shall modify its orders in these cases to conform to the views expressed in this opinion, and those orders, as modified, are ordered enforced.

Enforced As Modified.

APPENDIX C.

Decision and Order.

Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO *and* Woelke & Romero Framing, Inc. Cases 21-CB-6196 and 21-CC-1922.

November 13, 1978

Upon charges filed by Woelke & Romero Framing, Inc. (herein called Woelke or Charging Party), on August 11, 1977,[1] and duly served on Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein collectively called Respondents), the General Counsel of the National Labor Relations Board, acting through the Regional Director for Region 21, on September 23, issued and served on Respondents an order consolidating cases, consolidated complaint, and notice of hearing. The complaint alleged that Respondents (1) violated Section 8(b)(4)(i) and (ii)(A) of the National Labor Relations Act, as amended, by, among other acts, picketing Woelke at various jobsites in southern California with an object of forcing Woelke to enter into an agreement prohibited by Section 8(e) of the Act, and (2) violated Section 8(b)(1)(B) of the Act by, among other acts, bargaining to impasse and striking Woelke with an object of forcing Woelke to include within the bargaining unit of employees represented by Respondents foremen of Woelke who are supervisors within the meaning of Section 2(11) of the Act and Woelke's selected representatives for purposes of collective bargaining or ad-

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[1]Unless otherwise indicated, all dates are in 1977.

justment of grievances within the meaning of Section 8(b)(1)(B) of the Act. On October 3 Respondents filed, and duly served on Woelke and the General Counsel, their answer to the consolidated complaint in which they denied the commission of any unfair labor practices.

Thereafter, on October 19, Respondents, Woelke, and counsel for the General Counsel entered into a stipulation of facts and a motion to transfer the proceedings to the Board wherein they agreed that the charges, the order consolidating cases, consolidated complaint, and notice of hearing, the answer to complaint, and the stipulation of facts, including the exhibits attached thereto, shall constitute the entire record herein and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waive a hearing before an Administrative Law Judge, the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision and desire to submit these cases for findings of fact, conclusions of law, and Order directly by the Board. The parties, however, expressly limited the stipulation of facts for the purposes of this proceeding only. In addition, the parties reserved the right to object to the relevancy, materiality, or competency of any of the facts stated in the stipulation.

On December 13 the Board issued an order approving the stipulation and transferring the proceeding to the Board and set a date for the filing of briefs. Thereafter, Respondents, Charging Party, and General Counsel filed briefs in support of their respective positions. In addition, briefs *amici curiae* were filed on behalf of the American Federation of Labor and Congress of Industrial Organizations, the Building and

Construction Trades Department, AFL-CIO, and the Chamber of Commerce of the United States of America.[2]

Pursuant to a notice of hearing issued by the Board on February 8, 1978, oral argument in this and related proceedings[3] was held before the Board in Washington, D.C., on February 23, 1978. In addition to arguments presented by the parties involved in the several proceedings, permission to argue orally as *amici curiae* was granted to the Chamber of Commerce of the United States of America, the American Federation of Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL-CIO, and the Laborers' International Union of North America, AFL-CIO.

The Board has considered the entire record herein as stipulated by the parties, as well as the briefs filed by the parties and the *amici curiae* and the oral arguments made to the Board, and hereby makes the following findings and conclusions:

I. THE BUSINESS OF THE EMPLOYERS

Woelke, as described more fully below, is a framing subcontractor in the building and construction industry in southern California which, at relevant times, had subcontracts with the following subcontractors:

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[2]Although the Chamber's brief is directed principally to 239 NLRB 264 it is also addressed to the issues posed in this proceeding.

[3]*Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.)*, 239 NLRB 253 (1978); *Los Angeles Buiding and Construction Trades Council*; and *Local Union No. 1497, United Brotherhood of Carpenters & Joiners of America (Donald Schriver, Inc. and Sullivan—Kelley & Associates)*, 239 NLRB 264 (1978); and *International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)*, 239 NLRB 274 (1978).

Vanguard Builders, Inc., herein called Vanguard, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in southern California as a general contractor. At all times material herein, Vanguard has been engaged as the general contractor on construction projects located at Columbia and Main Streets, Riverside, California, herein called the Columbia jobsite, and at Lynwood and Rockford Avenue, San Barnardino, California, herein called the Rockford jobsite.

Birth Development Company, Inc., herein called Birth, is now, and at all times material herein has been, a corportion engaged in the building and construction industry in southern California in the construction and sale of single-family residences. At all times material herein, Birth has been engaged in the construction of a single-family residence tract located at Alessandro Boulevard and Via Vista in Riverside, California, herein called the Alessandro jobsite.

Woodhaven Developers, Inc., d/b/a Woodhaven Enterprises, herein called Woodhaven, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in southern California as a general contractor. At all times material herein, Woodhaven has been engaged as the general contractor in the construction of a single-family residence tract located at Lincoln and Mary Streets in Riverside, California, herein called the Lincoln jobsite.

Woelke, with a place of business located in San Bernardino, California, is engaged in the building and construction industry in southern California, specializing in framing. As stated, at all times material herein, Woelke has been engaged, pursuant to subcontracts with Vanguard, Birth, and Woodhaven, in performing framing work at the Rockford

and Columbia jobsites, at the Alessandro jobsite, and at the Lincoln jobsite, respectively. During the normal course and conduct of its business operations described above, Woelke annually purchases and receives goods and products valued in excess of $50,000 from suppliers located within the State of California, each of which purchases and receives said goods directly from suppliers located outside the State of California. The parties stipulated, and we find, that Woelke is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act and a person engaged in commerce and in an industry affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act. The parties further stipulated, and we find, that Vanguard, Birth, and Woodhaven are, and each of them is, and have been at all times material herein, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Respondents are, and each of them is, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues.*

1. Are the subcontracting provisions in Respondents' contract proposal proscribed by Section 8(e) of the Act so as to render Respondent's picketing of Woelke to obtain these proposals violative of Section 8(b)(4)(i) and (ii)(A) of the Act?

2. Did Respondents violate Section 8(b)(1)(B) of the Act by bargaining to impasse with and striking Woelke over the inclusion of foremen within the collective-bargaining unit, when such foremen are supervisors within the meaning of Section 2(11) of the Act and the selected representatives of Woelke for purposes of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1) of the Act?

B. *The Stipulated Facts.*

As stated, Woelke at all times material herein has been engaged as a framing contractor in southern California, performing work under subcontracts for Vanguard at the Columbia and Rockford jobsites, Birth at the Alessandro jobsite, and Woodhaven at the Lincoln jobsite. At no times material herein have Respondents, or either of them, been engaged in a labor dispute with Vanguard, Birth, or Woodhaven, or any of their subcontractors other than Woelke. At all times material herein, Respondents, and each of them, have been engaged in a labor dispute with Woelke.

Woelke has been party to a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its various district councils and local unions, including Respondents, in the 11 southern California counties since July 5, 1974, by virtue of the execution on that date of a memorandum of agreement with Respondent Local No. 944. The memorandum of agreement, which by its terms was due to expire on or about June 15, 1977, provided *inter alia*, that Woelke would be bound by the 1974-77 Master Labor Agreement (herein called the 1974 MLA) of the Carpenters Union when the 1974 MLA was agreed to by the Carpenters Union and the various contractor associations which negotiated the MLA. On July 27, 1974, the Carpenters Union and the various contractor associations

agreed to the 1974 MLA. Consequently, Respondents and Woelke have been party to the 1974 MLA since that time. The 1974 MLA contained a union recognition clause and certain other clauses which, in effect, obligated Woelke to recognize the Carpenters Union and Respondents as the collective-bargaining representative of Woelke's employees, including those foremen to whom Woelke had given supervisory and grievance adjustment authority.[4] That agreement also contained, in article I, paragraph 103, subcontracting provisions similar to those involved here, set out *infra*[5]

From on or about June 3 to on or about August 4, 1977, Respondents, through their agent, Joseph Eickholt,[6] pursuant to notice, engaged in six collective-bargaining sessions with Woelke for the purpose of negotiating a successor collective-bargaining agreement. On or about August 4 Respondents and Woelke agreed that further negotiations should be postponed indefinitely, since Respondent and Woelke agreed that they had reached impasse over various proposals of Respondents. Among the issues which resulted in the impasse was Respondents' demand for, and Woelke's refusal to agree to, a proposal to include within the unit of

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[4]Art II—union recognition—sec. 201 reads:

> The Contractor hereby recognizes the Union as the sole and exclusive collective bargaining representative of all employees and persons employed to perform work covered by this Agreement. . . . Employees and persons employed to perform work covered by this Agreement specially include Craft Foreman. A superintendent shall not use working tools.

[5]The validity of the subcontracting clauses in the 1974 MLA is raised in *Los Angeles Building and Construction Trades Council; and Local Union No. 1497, Carpenters (Donald Schriver, Inc.), supra*, issued this day.

[6]The parties stipulated that Joseph Eickholt has been and is now a representative of Respondents, acting on their behalf, and at all material times has been, and is now, an agent of Respondents within the meaning of Sec. 2(13) of the Act.

employees whom Respondents will represent for purposes of collective bargaining foremen of Woelke who do not reguarly perform bargaining work and who are supervisors within the meaning of Section 2(11) of the Act and who are also Woelke's selected representatives for purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.[7]

Another issue on which the parties reached impasse was Respondents' subcontracting proposal which included all the provisions of article I, paragraph 103, and all its subparts, set forth below:

103. The purposes of this paragraph 103 are to preserve and protect the work opportunities normally available to employees and workmen covered by this Agreement, maintenance and protection of standards and benefits of employees and workmen negotiated over many years, and preservation of the right of union employees, employed hereunder, from being compelled to work with non-union workmen.

103.1 In the event that enforcement of paragraph 103.2 is restrained by issuance of an injunction by a United States District Court upon the petition of a Regional Direction [sic] of the National Labor Relations Board, or otherwise, such provision shall be suspended pending its final adjudication, and the provisions set forth in paragraph 103.3 shall be applicable pending final adjudication thereof.

103.1.1 Definition of Subcontractor. A subcontractor is defined as any person (other than an employee covered by this Agreement), firm or corporation holding a valid state contractor's license where required by law who agrees orally or in writing to perform, or who in fact performs for or on

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[7]Art II—union recognition, and sec. 1612 of Respondents' contract proposals are set forth *infra*.

behalf of an individual Contractor, or the subcontractor of an individual Contractor, any part or portion of the work covered by this Agreement.

103.2 The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

103.3 Because of the close relationship between individual Contractors and subcontractors at the jobsite and the close community of interests of the employees on the jobsite with respect to on-site work covered by this Agreement, that is, work done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete or batch plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), herein called "jobsite work", and because of the Union's concern that subcontractors who are not subject to the same total labor costs as those who are party hereto will deprive Union members employed hereunder of work opportunities because of lower labor costs, it is agreed as follows:

103.3.1 The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona-fide labor organization, and whose labor costs on such job, at all times during the term of his subcontract hereunder are not less

than those of contractors performing similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.

103.3.2 The Contractor shall require each such subcontractor to weekly supply to the Contractor, who will then upon request make available to the Union a copy of the subcontractor's certified labor costs for such job, and to submit to an audit of those labor costs by a certified public accountant upon request of the Union to confirm compliance with 103.3.1.

103.3.3 Failure to comply with the foregoing subparagraph 103.3.1 and 103.3.2 shall entitle the Union, notwithstanding Article V, to seek judicial relief, upon written notice to the Contractor and the subcontractor, to compel the suspension of such subcontractor's work until there has been compliance, together with attorney's fees for the bringing of such action. In any such court proceeding, the court shall, if it is thereafter in dispute, determine whether there has been compliance.

103.5 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.

103.6 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance

and compliance by his subcontractors with the full terms of this Agreement."

Since August 4 no further collective-bargaining sessions have been held, and neither Respondents nor Woelke has requested further negotiations. In furtherance and support of Respondents' aforementioned labor dispute with Woelke, and in support of Respondents' demand for the contract provisions described above, Respondent Local No. 235 picketed at the Columbia, Alessandro, and Lincoln jobsites on August 10, September 21, and October 5, respectively, with signs reading:

Information
WOELKE & ROMERO
Operating
NONE [sic] UNION
Carpenters

On August 28 Respondent Local No. 944 picketed at the Rockford jobsite with picket signs identical to those described above. As a consequence of the acts and conduct of Respondent Local No. 235 set forth above, individuals employed by various subcontractors of Vanguard and Birth engaged in work stoppages and refusals to perform services for their respective employers at the Columbia and Alessandro jobsites.

C. *Contentions*

1. The subcontracting proposals

The General Counsel and Woelke contend essentially that Respondents' subcontracting proposals set forth in paragraphs 103.2, 103.3.1, 103.5, and 103.6, *supra*, are proscribed by Section 8(e) of the Act and that Respondents' picketing in support of these proposals therefore violated Section 8(b)(4)(i) and (ii)(A) of the Act. Specifically, General Counsel and Woelke argue that the proposed subcon-

tracting provisions are secondary union signatory clauses and, as such, are presumptively unlawful unless privileged by the construction industry proviso to Section 8(e). General Counsel and Woelke further argue that the clauses here are not privileged by the proviso because they do not comport with the Supreme Court's interpretation of that proviso in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Accordingly, General Counsel and Woelke contend that the picketing by Respondents to compel Woelke to agree to these clauses violated Section 8(b)(4)(i) and (ii)(A) of the Act.

Respondents, on the other hand, contend that the proposed subcontracting provisions are lawful primary clauses because they are designed to preserve traditional bargaining unit work for bargaining unit employees and to maintain economic standards at jobs performed by union members. Respondents also argue that the provisions in issue, even if deemed to be secondary in nature, are lawful in any event because they are protected by the construction industry proviso to Section 8(e) of the Act. Respondents argue that *Connell, supra,* is not applicable to the instant dispute because, unlike the critical facts in that case, Respondents here have a lawful collective-bargaining relationship with Woelke.

The *amici curiae* briefs of the American Federation of Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL-CIO, and the Chamber of Commerce of the United States of America provide additional argument in general support of the positions taken by Respondents and by General Counsel and Woelke, respectively.

2. The proposal to include foremen in unit

The General Counsel and Woelke contend that Respondents' insistence to impasse upon, and picketing in support of, their proposal to include within the collective-bargaining

unit Woelke's foremen who are supervisors within the meaning of Section 2(11) of the Act, and whom Woelke has selected as its collective-bargaining and grievance-adjusting representatives within the meaning of Section 8(b)(1)(B) of the Act, constitutes unlawful restraint and coercion within the meaning of Section 8(b)(1)(B) of the Act. Neither Respondents' brief nor the briefs filed by *amici curiae* addressed this issue.

D. *Discussion and Conclusions*

1. The subcontracting proposals

The gravamen of the complaint is that Respondents' proposed subcontracting clauses quoted above are violative of Section 8(e) of the Act and that Respondents' picketing in support thereof violated Section 8(b)(4)(i) and (ii)(A) of the Act.[8] Respondents contend that the clauses are primary in

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[8]Sec. 8(e) of the Act provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

Sec. 8(b)(4)(i) and (ii)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents—(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e).

nature because they seek to preserve traditional bargaining unit work for bargaining unit employees and because they are designed to maintain economic standards on jobs at which union members work. Respondents further contend that, in any event, the clauses are protected by the construction industry proviso to Section 8(e). With the issues thus joined, our first area of inquiry is whether the disputed clauses, notably paragraphs 103.2, 103.3, 103.5, and 103.6, are primary or secondary in scope. If they are primary, then Respondents' picketing to obtain these clauses would clearly be lawful. If, however, the clauses are secondary in nature, we must determine whether they are nevertheless privileged by the construction industry proviso to Section 8(e). of the Act. In this connection we must determine to what extent, if any, the Supreme Court's decision in *Connell, supra,* narrowed the scope of that proviso as previously interpreted by the Board and courts, particularly as it relates to the facts stipulated here. If we conclude that the disputed clauses are privileged under the proviso, then Respondents' picketing of Woelke to obtain these clauses also would be lawful. If, on the other hand, the clauses are not so privileged, then, of course, the picketing by Respondents violated Section 8(b)(4)(i) and (ii)(A) of the Act.

It is well settled that contract clauses which are limited to primary considerations, such as the preservation or protection of the traditional work of employees in the bargaining units represented by a union, are not proscribed by Section 8(e) of the Act. *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967). As the Court stated in that decision, at 644-645:

> The determination of whether the [challenged contract provision] . . . violated Section 8(e) and Section 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the

> Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. Were the latter the case [the contracting employer] . . . would be a neutral bystander, and the agreement . . . would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. [Citations omitted.]

The ultimate question in each case, therefore, is whether the thrust of the clause in question is primary and, therefore, lawful or whether it is secondary and, accordingly, unlawful.

The distinction between primary and secondary clauses was succinctly spelled out by the Board in *California Dump Truck Owners Association*[9] as follows:

> Section 8(e) of the Act makes it an unfair labor practice for an employer and a union to enter into an agreement, express or implied, whereby the employer agrees to cease dealing in the products of any other employer or to cease doing business with any other person. A literal construction of this section suggests the illegality of any agreement which results in pre-

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[9]*Heavy, Highway, Building and Construction Teamsters Committee for Northern California, et al. (California Dump Truck Owners Association)*, 227 NLRB 269, 272 (1976) (then-Member Fanning and Member Jenkins dissenting in part).

venting the employer from establishing a business relationship with another employer, or which causes him to break off a relationship already established. The section, however, has not been construed to outlaw all agreements which produce such results.

Contract clauses which purport to limit subcontracting to employers who are signatories to union contracts, so-called union signatory clauses, and contract clauses which purport to acquire for bargaining unit employees work which has traditionally been performed by employees of other employers, so-called work acquisition clauses, have been held to violate the Act. Such clauses are viewed as not being designed to protect the wages and job opportunities of unit employees covered by the contract, but as directed at furthering general union objectives and undertaking to regulate the labor policies of other employers. Absent a direct relationship to protection of the work of unit employees, such clauses are considered as having an unlawful secondary effect and are proscribed by Section 8(b)(4) and (e).

On the other hand, however, contract clauses whose basic aims are to limit subcontracting so as to preserve for unit employees work which has customarily been performed by them, or in some instances to recapture work regarded as fairly claimable, so-called unit protection clauses, and contract clauses designed to limit subcontracting of unit work to employers who maintain the same standards of employment, thus minimizing the economic incentive to subcontract, so-called union standard clauses, have been held to be lawful. The underlying rationale for the lawful character of unit protection and union standard clauses is that the union has a primary interest in preserving unit work for unit employees and to insure that negotiated standards will not be undermined. [Citations omitted.]

It is equally well settled, as reflected in the foregoing quotations, that contract clauses which permit subcontracting only to subcontractors who pay their employees at least the equivalent of the economic terms negotiated in the union's contract are also primary clauses which do not contravene the prohibition of Section 8(e). In *Construction Materials Trucking, Inc.*,[10] the Board, adopting the opinion of its Trial Examiner, explained at 1038 the underlying reasoning supporting the area or union standards clauses as follows:

> A union has a legitimate interest in preventing the undermining of the work opportunities and standards of employees in a contractual bargaining unit by subcontractors who do not meet the prevailing wage scales and employee benefits covered by the contract. Thus, its contract with an employer may require the employer, if it subcontracts, to subcontract to another employer who agrees to observe "the equivalent of union wages, hours, and the like" provided for in the bargaining agreement. Such a provision, generally referred to as a union standards clause, does not violate Section 8(e) because it has a primary object: to aid the employees in the work unit. Where, however, the object is not to protect or preserve the working standards of employees in the unit, but to control the employment practices of firms which seek to do business with the employer and to aid and assist union members generally, such object is secondary and unlawful. [Citations omitted.]

Respondents' proposed paragraph 103.2 requires the contractor to agree "that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the

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[10] *General Teamsters Local 386, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Construction Materials Trucking, Inc.)*, 198 NLRB 1038 (1972).

site of construction . . . except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement." This clause, contrary to Respondents' contentions, goes far beyond protecting traditional bargaining unit work for bargaining unit employees. For the clause does not prohibit Woelke from subcontracting work which Woelke's employees perform or could perform, but, rather, expressly permits such subcontracting, albeit only to employers who are signatory to a "current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement."

Similarly, proposed paragraph 103.2 also does not limit subcontracting to firms which pay their employees the equivalent of the economic provisions of Respondents' contract, but, instead, requires that all subcontracting be to employers or firms who are "signatory to this Agreement." Therefore, the foregoing provision is neither a valid work preservation clause nor a valid union standards provision. Rather, the provision is a classic union signatory clause of the type which the Board has consistently found to be secondary in nature because it is not concerned primarily with the labor relations of the contracting employer—Woelke here—*vis-a-vis* its employees, but with the labor relations of other employers or firms with whom Woelke might choose to do business.[11] Thus, we find that paragraph 103.2 is a union signatory clause which is proscribed by Section 8(e) of the Act, unless it is saved by that section's construction industry proviso.

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[11] *General Teamsters, Chauffeurs, Warehousemen and Helpers*, Local 2, *IBT* (J.K. Barker Trucking Co.), 181 NLRB 515, 519-520 (1970); *Local 437, International Brotherhood of Electrical Workers, AFL-CIO* (*Dimeo Construction Co.*), 180 NLRB 420 (1969).

Before discussing whether the construction industry proiso saves paragraph 103.2 from unlawfulness, we address briefly Respondents' alternative proposal — paragraph 103.3.1 — which, under Respondents' total subcontracting proposal, would become operational in the event that paragraph 103.2 is enjoined by a court or is found unlawful by the Board.

Paragraph 103.3.1 provides that the employer (Woelke) may subcontract jobsite work only to employers whose employees "are members of a bona fide labor organization" and whose total labor costs on the jobsite "are not less than those of contractors performing similar work to that covered by this Agreement, including . . . [enumerated benefits] as provided by this Agreement." General Counsel and Woelke contend that this is but a thinly disguised union signatory provision. General Counsel argues that the secondary objective of this clause is evidenced by its requirement that subcontractors pay their employees the specifically enumerated benefits "as provided by this Agreement" and the further requirement that employees of subcontractors be members of a bona fide labor organization. Respondents, on the other hand, contend that this clause is a lawful area standards provision.

Contrary to Respondents' contention, we find that the clause exceeds the permissible bounds of a lawful area standards provision.[12] Thus, it is not limited to assuring that subcontractors pay their employees the cost equivalent of Respondents' contract, but it additionally requires that the subcontractors' employees be "members of a bona-fide labor organization." It is the latter requirement which, in our view, removes the clause from the sphere of lawful area standards provisions. For the union membership or non-

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[12] *Dimeo Construction Co., supra.*

membership of the subcontractor's employees can have no legitimate bearing on whether the subcontractor pays the equivalent of the economic costs provided in Respondents' contract. *N.L.R.B. v. Bangor Building Trades Council (Davison Constr. Co.)*, 278 F.2d 287, 290 (1st Cir. 1960); *Building and Construction Trades Council of San Bernardino and Riverside Counties et al., (Gordon Fields) v. N.L.R.B.*, 328 F.2d 540, 541 (D.C. Cir. 1964).

Having found that Respondents' proposed subcontracting provisions are neither primary work preservation nor area standards clauses, we turn now to whether these clauses, although secondary in their thrust, are nevertheless protected by the construction industry proviso. In this connection, we must determine first whether such contract provisions as those here in dispute were held to be protected by the proviso to Section 8(e) before the Supreme Court's decision in *Connell, supra,* and, if so, whether they no longer enjoy such protection since *Connell.*

Since the enactment of the 1959 amendments to the Act, the Board and courts have consistently upheld contract provisions between employers and unions in the construction industry which permit the employer to subcontract work to be performed at the site of the construction only to subcontractors who are signatory to contracts either with a particular union or with unions having jurisdiction over the type of work involved. Although the Board initially held that picketing to obtain such union signatory contracts violated Section 8(b)(4)(A) of the Act, such holdings were

denied enforcement in several courts of appeals.[13] Subsequently, in *Northeastern Indiana Building and Construction Trades Council, et al.* (*Centlivre Village Apartments*, 148 NLRB 854 (1964), the Board acquiesced in the courts' views and held that the union signatory clauses are not only protected by the proviso to Section 8(e) but also that picketing to secure such clauses was not unlawful under Section 8(b)(4)(A) of the Act. Thus, the Board has upheld clauses such as those herein, which are not limited to particular existing jobsites or to the duration of particular jobs. The only limitation on union signatory clauses was that they could not be enforced by union "self-help" measures.[14]

As can be seen from the foregoing cases, as well as others too numerous to cite, the Board, with court approval, has construed the construction industry proviso literally to protect "any agreement" between qualified parties which limits subcontracting of work to be performed at the site of con-

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[13]*Construction, Production & Maintenance Laborers' Union, Local 383, AFL-CIO & United Brotherhood of Carpenters & Joiners of America, Local 1089, AFL-CIO* (*Colson & Stevens Construction Co.*), 137 NLRB 1650 (1962), enfd. in part 323 F.2d 422 (9th Cir. 1963). *Orange Belt District Council of Painters No. 48* (*Calhoun Drywall Company*), 139 NLRB 383 (1962), vacated and remanded 328 F.2d 534 (D.C. Cir. 1964). *The Essex County and Vicinity District Council of Carpenters, etc.* (*The Associated Contractors of Essex County, Inc.*), 141 NLRB 858 (1963), enforcement denied 332 F.2d 636 (3d Cir. 1964). *Building and Construction Trades Council of San Bernardino, etc.* (*Gordon Fields*), 139 NLRB 236 (1962), enforcement denied 328 F.2d 540 (D.C. Cir. 1964). See also *Local Union No. 48 of Sheet Metal Workers International Association v. The Hardy Corporation*, 332 F.2d 682 (5th Cir. 1964).

[14]*Ets-Hokin Corporation*, 154 NLRB 839, 842 (1965), and cases cited therein, enfd. *sub nom. N.L.R.B. v. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 769*, 405 F.2d 159, 162-163 (9th Cir. 1968), cert. denied 395 U.S. 921 (1969, *Heavy, Highway, Building and Construction Teamsters Committee for Northern California, et al.* (*California Dump Truck Owners Association*), 227 NLRB 269 (1976) (then-Member Fanning and Member Jenkins dissenting in part).

struction to employers who are signatory to a specific union agreement or to an agreement generally with the "appropriate union" (meaning, generally, an affiliate of a building and construction trades council). Remaining at issue, then, is whether and to what extent the Supreme Court's decision in *Connell* has limited the scope of the proviso from its previous broad interpretation.

General Counsel and Woelke argue that the scope of the proviso has been "significantly narrowed" by the *Connell* decision. Thus, General Counsel argues that, based upon the Supreme Court's rationale in *Connell*, a contractual provision which is otherwise violative of Section 8(e) of the Act will not be privileged by the construction industry proviso thereto unless: (1) a valid collective-bargaining relationship exists between the labor organization and the employer, (2) the contractual clause is operational only at times when the employer has employees represented by the labor organization, (3) the clause applies only to sites at which the employer has employees represented by the labor organization, and (4) the clause does not require that the employer have collective-bargaining relationships with particular unions.

General Counsel and Woelke concede that Respondents and Woelke have a lawful collective-bargaining relationship and, therefore, do not contend that any collective-bargaining relationship requirement of *Connell* is wanting. General Counsel argues, however, that Respondents' proposed clauses 103.2, 103.3.1, 103.5, and 103.6 are not privileged by the construction industry proviso, pursuant to *Connell*, because said clauses (1) are operational at all times and at all jobsites whether or not Woelke employs employees working within the craft jurisdiction of Respondents and (2) require that Woelke must subcontract only to particular labor organizations. Respondents, on the other hand, argue

that *Connell* is inapplicable here because, among other reasons, a lawful collective-bargaining relationship exists between Respondents and Woelke, a factor which the Court found was critically lacking in *Connell*. For the reasons discussed below, we reject General Counsel's contention and find, instead, that the subcontracting provisions here involved are protected by the construction industry proviso. Such conclusion, we are persuaded, is fully consistent with the teachings of *Connell*.

The relevant facts in *Connell*, an antitrust action, are simple and straightforward. Local 100 picketed certain general contractors in the Dallas, Texas, area, including Connell, for the sole purpose of compelling such contractors to agree that, in letting subcontracts for the performance of mechanical work, they would deal only with firms that were parties to that union's current collective-bargaining agreement. The avowed purpose of this contract was to assist Local 100 in its efforts to organize the mechanical subcontractors in the area. Local 100 had no contract with Connell, Connell employed no workers of the type whom Local 100 exists to represent, and, significantly, Local 100 expressly disclaimed any interest in representing Connell's employees. Local 100 did not seek a complete bargaining contract with Connell, but only a subcontracting agreement. Connell succumbed to the picketing and, thereafter, filed suit in a Federal district court to annul the resulting agreement as an illegal restraint on competition under sections 1 and 2 of the Sherman Act. Local 100 defended on the ground that the subcontracting agreement was protected by the construction industry proviso to Section 8(e) of the Act. Connell, on the other hand, argued that, despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship; that is, Congress did not intend to

permit a union to approach a "stranger" contractor and obtain a binding agreement not to deal with nonunion subcontractors for the purpose of organizing such nonunion subcontractors from the "top down."

The specific question before the Court was whether the existence of a collective-bargaining relationship constituted a prerequisite to or, as the Court phrased it, a limitation on the applicability of the construction industry proviso to clauses restricting the subcontracting of work on a construction site. The Court's interpretation of the legislative history and the policies underlying the proviso was conducted solely with a view toward determining whether the proviso was so limited. Thus, the Court stated at the outset of its decision:

> On its face, the proviso suggests no such limitation. This Court has held, however, that § 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment.[15]

The Court's subsequent construction of the proviso led to the conclusion that, in the absence of a collective-bargaining relationship between Connell and Local 100, the proviso did not immunize Local 100's subcontracting agreement from Federal antitrust laws.

In reaching its conclusion, the Court examined the legislative as well as decisional history of the 1959 amendments, including Section 8(b)(4) and 8(e). It noted that Congress, in enacting Section 8(e), was concerned essentially with plugging certain technical loopholes in Section 8(b)(4) under which it was unlawful for a union to coerce an employer to agree to or enforce a hot cargo agreement but not unlawful for a union and employer voluntarily to execute such hot cargo agreement. *Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL,*

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[15]*Connell, supra,* 421 U.S. at 628.

etc. [*Sand Door and Plywood Company*] *v. N.L.R.B.*, 357 U.S. 93, 106-107 (1958). Thus, Section 8(e) was designed in 1959 to close that loophole by making it an unfair labor practice to enter into a hot cargo agreement. At the same time, however, Congress was also considering legislation that would have overruled *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), by treating all employers working on the same construction site as a single employer. The attempt to overrule that case failed. The Court surmised that the construction industry proviso was adopted "as a partial substitute" for an outright reversal of *Denver Building Trades*. The Court noted that the legislative discussion of "special problems" in the construction industry focused on the close relationship between contractors and subcontractors at the jobsite and the friction that is created when union and nonunion employees are required to work side by side. Thus, Congress limited the construction industry proviso exclusively to work to be done at a construction site. Quoting from *National Woodwork Manufacturers Association, supra*, 386 U.S. at 638-639, the Court stated that it has interpreted the construction industry proviso as

> a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other.

The Court noted that other courts have suggested that the proviso serves an even narrower function of alleviating frictions that may arise between union and nonunion employees working together at the same construction site.[16]

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[16]*Connell, supra*, 421 U.S. at 630, citing *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers, Local Union No. 695. IBT (Threlfall Construction Company) v. N.L.R.B.*, 361 F.2d 547 (D.C. Cir. 1966).

Thus, the Court identified certain policies underlying the enactment of the proviso which are relevant to determining the applicability of the proviso to subcontracting clauses disputed between parties who do not have a collective-bargaining relationship. It concluded that the *Connell* clause was not related to these policies in that Local 100 did not claim to be protecting Connell's employees from having to work alongside nonunion workers and was not seeking to organize any nonunion subcontractors on the jobsite it picketed; instead, the union admittedly sought the subcontracting agreement solely as a means of pressuring mechanical subcontractors in the Dallas area to recognize it as the representative of their employees.

In these circumstances, the Court found that extending the protection of the proviso to the clause sought by Local 100 would undermine one of the major aims of the 1959 Act, which was to limit "top-down" organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of its employees. The Court reasoned in *Connell*, 421 U.S. at 631-632:

> If we agreed with Local 100 that the construction-industry proviso authorizes subcontracting agreements with "stranger" contractors, not limited to any particular jobsite, our ruling would give construction unions an almost unlimited organizational weapon. The unions would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere.

The Court rejected Local 100's argument that the Board had already decided this issue in *Los Angeles Building and Construction Trades Council (Joseph Freed & Benjamin H. Weber, d/b/a B & J Investment Company)*, 214 NLRB 562 (1974), wherein the Board held at 563 that "a union has

the right to picket to compel an employer to execute a labor agreement containing a subcontracting clause valid under the construction industry proviso to Section 8(e), as long as it does not have the additional objective of forcing an employer to cease doing business with 'an existing and identified nonunion subcontractor.' " The Court at 631, footnote 10, of its opinion in *Connell*, noted that the "agreement in question *in B&J* may have been a prehire contract under § 8(f), and it is not clear that the contractor argued that it was invalid for lack of a collective-bargaining relationship."

Thus, the Court's entire decision is cast in terms of the impact of the absence of a collective-bargaining relationship upon the applicability of the proviso to a subcontracting clause which comes within the literal language of the proviso. That this is the heart of the *Connell* decision is evident from the Court's concluding statement:

> [W]e are unwilling to read the construction industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.[17]

Contrary to the General Counsel's contention, we find nothing in our analysis of *Connell* which compels a narrower interpretation of the proviso as suggested by General Counsel. The bottom line of the Court's opinion, as we construe it, is that the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective-bargaining relationship, and possibly

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[17]*Connell, supra*, 421 U.S. at 633.

even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem.

Inasmuch as Respondents' proposed contract provisions here were advanced in the context of a collective-bargaining relationship between Respondents and Woelke, we find that the clauses are privileged by the construction industry proviso to Section 8(e) of the Act. Accordingly, we shall dismiss the complaint to the extent that it alleges that Respondents' picketing of Woelke in support of the subcontracting proposals violated Section 8(b)(4)(i) and (ii)(A) of the Act.

2. *The 8(b)(1)(B) issue; Respondents' proposal to include foremen in unit.*

It is clear from the stipulated facts that Respondents and Woelke bargained to impasse over the inclusion of foremen within the bargaining unit represented by Respondents.[18] It also stipulated that these foremen are supervisors

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[18]The text of Respondents' contract proposals concerning foremen reads as follows:

ARTICLE II—UNION RECOGNITION

201. The Contractor hereby recognizes the Union as the sole and exclusive collective bargaining representative of all employees and persons employed to perform work covered by this Agreement. It is understood that the Union does not at this time, nor will it during the term of this Agreement, claim jurisdiction over the following classes of employees; executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers or any employees of the Contractor above the rank of craft foreman. Employees and persons employed to perform work covered by this Agreement specifically include Craft Foreman. A Superintendent or assistant superintendent shall not give work instructions to journeymen carpenters or apprentices.

1612. Foremen: The selection of the individual who will be craft foreman is at the sole discretion of the Contractor. Is is understood that a craft foreman shall be an employee employed under the terms of this Agreement and shall receive the foreman's differential. Such craft foreman may work with the tools of the trade in accordance with the provisions of paragraph 403. Only craft foremen who normally work with the tools of their trade during straight-time periods may work with the tools of their trade during overtime periods. Whenever there are two or more journeymen employees one must be designated as a foreman. When

(footnote continued on following page)

within the meaning of Section 2(11) of the Act and Woelke's selected representatives for purposes of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B). It is further stipulated that these foremen do not perform bargaining unit work. Finally, it is stipulated that an object of Respondents' picketing was to compel Woelke to agree to include these foremen in the unit. General Counsel contends that, by the foregoing conduct, Respondents violated Section 8(b)(1)(B) of the Act.

Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances. Since enactment of this provision in 1947, the Board has consistently held that strikes to compel employers to select their foremen from within the ranks of the union are clearly proscribed.[19] More recent Board decisions confirm that the mere attempt by unions to compel inclusion

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a carpenter is designated as a foreman and is assigned the responsibility of supervision of five or more journeyman he shall not be allowed to work as a journeyman. In case more than two foremen are employed on the same shift on the same job, it shall be designated a general foreman whose duty shall be to convey orders from the contractor to the foreman. No carpenter foreman shall supervise a crew of more than ten men, not including himself. A carpenter foreman can supervise a crew on one jobsite only. The need for any number of craft foremen required for the performance of the work shall be determined in accordance with the provisions of paragraph 402. It is understood that in certain cases, by reason of custom and practice established by the parties, a craft foreman may direct the work and employees of more than one craft. Whenever the employer assigns supervisory authority to an employee covered by the terms of this Agreement, the employee will be paid at the foreman's rate.

[19]*International Typographical Union and Baltimore Typographical Union No. 12 (Graphic Arts League)*, 87 NLRB 1215, 1218 (1949); *International Typographical Union, AFL-CIO (Haverhill Gazette Company)*, 123 NLRB 806 (1959), enfd. 278 F.2d 6 (1st Cir 1960).

of statutory supervisors within the collective-bargaining unit is, without more, violative of Section 8 (b)(1)(B) of the Act.[20] In view of the stipulated facts and the applicable laws and Board precedent in this area, we find and conclude that Respondents violated Section 8(b)(1)(B) of the Act by bargaining to impasse and by striking Woelke with an object of forcing Woelke to agree to include its statutory supervisors within the bargaining unit represented by Respondents.

Conclusions of Law

1. Woelke & Romero Framing, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By bargaining to impasse, striking, or picketing Woelke & Romero Framing, Inc., for the purpose of requiring the inclusion in the collective-bargaining unit of any foremen of Woelke & Romero who are supervisors within the meaning of Section 2(11) of the Act and Woelke & Romero's selected representatives for purposes of collective bargaining or adjustment of grievances, Respondents have violated Section 8(b)(1)(B) of the Act.

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[20] *International Organization of Masters, Mates, and Pilots, AFL-CIO (Cove Tankers Corporation)*, 224 NLRB 1626 (1976); *International Organization of Masters, Mates and Pilots, Marine Division, etc. (Westchester Marine Shipping Co., Inc., et al.)*, 219 NLRB 26 (1975). See also *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790 (1974); *N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974).

4. The above unfair labor practices are unfair labor practices affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondents have not violated the Act in any other manner.

Remedy

Having found that Respondents have violated Section 8(b)(1)(B) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action which we find will effectuate the purposes of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, San Bernardino, California; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Riverside, California, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Bargaining to impasse, striking, or picketing Woelke & Romero Framing, Inc., or any other employer, for the purpose of requiring such employer to agree to include within the bargaining unit any foremen who are supervisors within the meaning of Section 2(11) of the Act and who are such employers' selected representatives for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

(b) In any like or related manner restraining or coercing Woelke & Romero Framing, Inc., in the selection of its representatives for purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action:

(a) Post at their offices and meetings halls copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

APPENDIX

Notice To Members
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not bargain to impasse, strike, or picket Woelke & Romero Framing, Inc., or any other employer, for the purpose of requiring such employer to agree to include within the bargaining unit any foremen who are supervisors within the meaning of Section 2(11) of the National Labor Relations Act and who are such employers' selected representatives for the purposes of collective bargaining or the

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[21]In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

We will not in any like or related manner restrain or coerce Woelke & Romero Framing, Inc., in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances.

Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, ALF-CIO

Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO